(26,745)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 659.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WASHBURN LIGNITE COAL COMPANY.

IN ERROR TO THE DISTRICT COURT, SIXTH JUDICIAL DISTRICT, STATE OF NORTH DAKOTA.

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1 In the Supreme Court of the State of North Dakota.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,

vs.

WASHBURN LIGNITE COAL COMPANY, Defendant in Error.

To the Honorable Justices of the Supreme Court of the State of North Dakota:

Your petitioner, the above named Minneapolis, St. Paul & Sault Ste. Marie Railway Company, respectfully shows that this action was brought by the plaintiff in error to recover from defendant in error certain alleged undercharges for carrying coal from June 30th, 1910, to June first, 1915, to-wit: the difference between the statutory rates on coal provided in Chapter 51 of the laws of North Dakota for the year 1907 (which latter rates plaintiff in error claims were confiscatory) and the reasonable rates alleged in the complaint. That said cause was commenced in the District Court of the Sixth Judicial District of North Dakota; that thereafter the defendant in error demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action; that thereafter upon a hearing duly had the trial court entered an order sustaining said demurrer; that thereafter plaintiff in error duly appealed to the Supreme Court of the State of North Dakota from the order of
2 the trial court last mentioned, and such proceedings were thereafter had that said last named court rendered its decision affirming the order appealed from; that thereafter the Supreme Court of North Dakota duly remitted its decision to the trial court from which the appeal had been taken to be enforced accordingly; that thereafter and pursuant to the mandate of said Supreme Court of North Dakota said trial court did, on the 2nd day of August 1918 duly cause to be entered against your petitioner a judgment affirming the order sustaining said demurrer and adjudging that the plaintiff's complaint herein be dismissed with prejudice, as will appear by reference to the records and proceedings in said cause, and that said judgment last mentioned is a final judgment between the parties hereto, and the judgment of the highest court of law or equity in said state in which a decision in the said suit could be had. That by the said suit there was drawn in question the validity of an authority exercised under the United States and the decision was against its validity, and there was also drawn in question the validity of a statute of, or authority exercised under, said state, on the ground of their being repugnant to the Constitution of the United States, or the laws of the United States, and the decision was in favor of their validity, all of which will more fully appear in detail from the assignments of error filed herein.

Wherefore the said Minneapolis, St. Paul & Sault Ste. Marie Railway Company prays that a writ of error may issue to said District Court of the Sixth Judicial District (the latter court, according to the practice and laws of the State of North Dakota, being the court in which said final judgment is entered and which court now has custody of all the records in said suit) for the correcting of the error complained of, and that a duly authenticated transcript of the record, proceedings and papers therein may be sent to the Supreme Court of the United States.

Dated this 7th day of August, 1918.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.
By JOHN D. ERDALL,
Its Attorney.

[Endorsed:] Filed in the office of the Clerk of the District Court, Burleigh County, North Dakota, this 7th day of August A. D. 1918. Chas. Fisher, clerk, by Emma J. Fisher, deputy.

STATE OF MINNESOTA,
County of Hennepin, ss:

John L. Erdall, being first duly sworn on oath says that he is the General Attorney for the Petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true to the best of affiant's knowledge and belief.

JOHN L. ERDALL.

Subscribed and sworn to before me this 5th day of August 1918.

ALFRED O. BJORKLUND,
Notary Public.

Hennepin County, Minn. My commission expires Nov. 17, 1922.

[Notarial Seal, Hennepin Co., Minn.]

[Endorsed:] Filed in the office of the Clerk of the District Court, Burleigh County, North Dakota, this 7th day of August A. D. 1918. Chas. Fisher, clerk, by Emma J. Fisher, deputy.

In the Supreme Court of the State of North Dakota.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Plaintiff in Error,

VS.

WASHBURN LIGNITE COAL COMPANY, Defendant in Error.

Order Allowing Writ of Error.

Now comes the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, plaintiff in error above named, on this 7th day of August 1918, and files and presents to this court its petition praying for the

allowance of a writ of error intended to be urged by it, and praying further that the duly authenticated transcript of the record, proceedings and papers, upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court, desiring to give the petitioner an opportunity to test in the Supreme Court of the United States the questions herein presented,

It is ordered by this court that the writ of error be allowed as prayed, and, that this order shall operate as a supersedeas according to the stipulation attached.

In testimony whereof, witness my hand this 7th day of August 1918.

ANDREW A. BRUCE,
Chief Justice of the Supreme Court of the State of North Dakota.

[Endorsed:] Filed in the office of the Clerk of the District Court, Burleigh County, North Dakota, this 7th day of August A. D. 1918. Chas. Fisher, clerk, by Emma J. Fisher, deputy.

6 Supreme Court of the United States, October Term, 1918.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Plaintiff in Error,

vs.

WASHBURN LIGNITE COAL COMPANY, Defendant in Error.

Assignments of Error.

Now comes the above named plaintiff in error and files with its petition for a writ of error, and for the purpose of having the same reviewed in the Supreme Court of the United States, it's assignment of errors as follows:

I. The Supreme Court of North Dakota erred in affirming the order of the trial court sustaining the demurrer to the complaint herein on the ground that said complaint on its face fails to state facts sufficient to constitute a cause of action.

II. The state court erred in entering final judgment in this proceeding in favor of the defendant in error and against the plaintiff in error.

III. The state court erred in refusing to hold that the rates on coal prescribed by Chapter 51 (Laws of North Dakota 1907) as applied to the shipments involved in this litigation, were confiscatory and therefore repugnant to Section 1, Article 14 of the Amendments to the Federal Constitution.

7 IV. The state court erred in deciding and adjudging that plaintiff in error could only collect from defendant in error for the coal shipments involved in this litigation, the rates prescribed

by said chapter 51; that such decision and adjudication of the state court amounts to depriving the plaintiff in error of its property without due process of law and denying to plaintiff in error the equal protection of the law, in violation of said Section 1, Article 14 of said Amendments.

V. The state court erred in deciding and adjudging that plaintiff in error was not entitled to recover from defendant in error the difference between the reasonable rate alleged in the complaint and the rate prescribed by said chapter 51; that such decision of the state court deprives plaintiff in error of its property without due process of law, and denies to plaintiff in error the equal protection of the law, in violation of said Section 1, Article 14, of said Amendments.

VI. The state court erred in refusing to give proper and due effect to the first decree entered in March 1910 pursuant to the mandate of the United States Supreme Court in the case of State of North Dakota, ex rel, vs. Northern Pacific Railway Company et al, in deciding and adjudging that said first decree operated in the future and fixed the rate prescribed by said Chapter 51 as the lawful rate in force and effect until the entry of the second decree in said state case in June 1915.

8 VII. The state court erred in deciding and adjudging that the first decree in the state case operated in the future and made the rate prescribed by said chapter 51 the lawful rate until the entry of the second decree in the state case. That such decision deprives the plaintiff in error of its property without due process of law, and denies to the plaintiff in error the equal protection of the law, in violation of Section 1, Article 14 of said Amendments.

VIII. The state court erred in deciding and adjudging that because the courts, at the time of the first decree in the state case, did not impose any terms, or require any bond or undertaking, plaintiff in error was without remedy, although the rate which the plaintiff in error was compelled to accept was confiscatory and unconstitutional. That such decision and adjudication of the state court in the present case amounts to taking the property of plaintiff in error without due process of law, and denies to plaintiff in error the equal protection of the law, in violation of said Section 1, Article 14, of said Amendments.

IX. The state court erred in refusing to give proper and due effect to the first decree entered in said state case, in deciding and adjudging that because the courts at the time of the first decree in the state case, did not impose any terms, or require any bond or undertaking, plaintiff in error was without remedy, although the rate prescribed by said Chapter 51, which the plaintiff in error was compelled to accept, was confiscatory and unconstitutional. That such decision and adjudication of the state court in the pre-

9 ent case amounts to taking the property of plaintiff in error without due process of law, and denies to plaintiff in error the equal protection of the law, in violation of said Section 1, Article 14 of said Amendments.

X. The state court erred in refusing to give proper and due effect to the second decree entered in the state case in deciding and adjudg-

ing that said second decree did not adjudge the rates prescribed in said Chapter 51, as applied to the shipments involved in this litigation, confiscatory and unconstitutional. In other words that said second decree operated wholly in the future and did not affect the past shipments of defendant in error, or past charges alleged to be due plaintiff in error, involved in the present litigation.

XI. The state court erred in deciding and adjudging that the second decree in the state case did not affect the rights of the plaintiff in error in respect to the past shipments involved in this litigation; that such rights were governed entirely by said Chapter 51 and the first decree in the state case; that such decision of the state court in the present case deprives plaintiff in error of its property without due process of law, and denies to plaintiff in error the equal protection of the law, in violation of said Section 1, Article 14, of said Amendments.

XII. The state court did not give proper and due effect to the second decree entered in the state case in refusing to hold that defendant in error was bound by the latter decree; that therefore the rates which plaintiff in error had been compelled to accept in connection with the shipments involved in this litigation, by virtue of said chapter 51, were confiscatory and unconstitutional.

XIII. The state court erred in deciding and adjudging that the sole scope of Section 1, Article 14, of said Amendments was to permit state action in violation of it to be set aside; that although the plaintiff in error had been compelled to carry coal for the defendant in error in violation of the amendment, such violation does not furnish any basis for a cause of action in favor of the plaintiff in error and against defendant in error.

Wherefore, for this and other manifest errors appearing in the record, the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, plaintiff in error, prays that the judgment of said Supreme Court of North Dakota against the plaintiff in error be reversed and set aside and held for naught, and that such other and further relief as may be just in the premises, and that judgment be rendered for plaintiff in error, granting to it its right under the Constitution of the United States, and plaintiff in error also prays for judgment for its costs.

JOHN L. ERDALL,
Attorney for Plaintiff in Error.

[Endorsed:] Filed in the office of the Clerk of the District Court, Burleigh County, North Dakota, this 7th day of Aug., A. D. 1918. Chas. Fisher, clerk, by Emma J. Fisher, deputy.

11 Supreme Court of the United States, October Term, 1918.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Plaintiff in Error.

vs.

WASHBURN LIGNITE COAL COMPANY, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable District Court of the Sixth Judicial District of the State of North Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the Supreme Court of the state of North Dakota, being the highest court of law or equity of said state in which a decision could be had in the said suit between the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, plaintiff in error and Washburn Lignite Coal Company, defendant in error, wherein was drawn in question the validity of an authority exercised under the United States and the decision was against its validity, and there was also drawn in question the validity of a statute of, or authority exercised under, said state, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity, a manifest error hath happened to the said Minneapolis, St. Paul & Sault Ste. Marie Railway Company, as by its complaint appears.

12 And because in accordance with the practice and laws of said state of North Dakota all the records in said suit have been duly remitted to said District Court of the Sixth Judicial District and are now in its custody, and pursuant to the directions and mandate of said Supreme Court of the state of North Dakota, final judgment has been entered therein against the plaintiff in error, said judgment last mentioned being the final judgment of the highest court of law or equity of said state in which a decision could be had in such suit, we being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, the said District Court of said Sixth Judicial District, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 7th day of August, 1918.

Done in the City of Bismarck, County of Burleigh, State of
13 North Dakota, with the seal of the District Court of the United States for the District of North Dakota, attached.

[Seal of the United States District Court of North Dakota.]

J. H. MONTGOMERY,
Clerk of the District Court of the United States for the District of North Dakota.

Allowed by

HON. ANDREW A. BRUCE,
Chief Justice of the Supreme Court of the State of North Dakota.

[Endorsed:] Filed in the office of the Clerk of the District Court, Burleigh County, North Dakota, this 7th day of Aug., A. D. 1918. Chas. Fisher, clerk, by Emma J. Fisher, deputy.

14 In the District Court, Sixth Judicial District.

STATE OF NORTH DAKOTA,
County of Burleigh:

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,

vs.

WASHBURN LIGNITE COAL COMPANY, Defendant in Error.

I, Clerk of the said District Court, do hereby certify that there was lodged with me as such clerk on the 7th day of August 1918, in the matter of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, plaintiff in error, against the Washburn Lignite Coal Company, Defendant in error:

1. The agreement between the parties waiving the giving of any bond for costs or supersedeas, such agreement to have the same effect as if a bond had been duly filed, as required by the Supreme Court of North Dakota.

2. Copies of the writ of error, as herein set forth—one for the defendant in error and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Bismarck, this 7th day of August, 1918.

[Seal of the District Court, Sixth Judicial District, Burleigh County, North Dakota.]

CHAS. FISHER,
Clerk of the District Court, 6th Judicial District, for the State of North Dakota, County of Burleigh.

15 In the Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Plaintiff in Error,

vs.

WASHBURN LIGNITE COAL COMPANY, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Washburn Lignite Coal Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the District Court of the Sixth Judicial District, County of Burleigh, State of North Dakota, wherein the Minneapolis, St. Paul & Sault Ste. Marie Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Chief Justice of the Supreme Court of North Dakota this 7th day of August A. D. 1918.

ANDREW A. BRUCE,
Chief Justice of the Supreme Court of North Dakota.

[Endorsed:] Filed in District Court, Burleigh County, North Dakota, Aug. 7, A. D. 1918. Chas. Fisher, clerk, by Emma J. Fisher, deputy.

16 Due and personal service of the within and foregoing citation is hereby admitted this 9th day of August A. D. 1918.

WASHBURN LIGNITE COAL COMPANY,
By MILLER, ZUGER & TILLOTSON,
Its Attorneys.

17 In the District Court, Sixth Judicial District.

STATE OF NORTH DAKOTA,
County of Burleigh:

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,

vs.

WASHBURN LIGNITE COAL COMPANY, Defendant in Error.

It is agreed between the parties to the above entitled action by their respective attorneys that the following portion of the records in the District Court of the Sixth Judicial District may be eliminated from the transcript of the record to be returned by the Clerk of the said state District Court pursuant to the writ of error commanding him to transmit to the Supreme Court of the United States a duly certified transcript of the complaint, record and proceedings in the within entitled cause for the reason that such portion of the record so omitted is not necessary to the consideration of any question to be reviewed by said Supreme Court of the United States, namely:

I. All papers and records relating exclusively to the taxation of costs in said proceeding.

JOHN L. ERDALL,
Attorneys for Plaintiff in Error.
MILLER, ZUGER & TILLOTSON,
Attorneys for Defendant in Error.

Dated Aug. 7, 1918.

[Endorsed:] Filed in District Court, Burleigh County, North Dakota, Aug. 7, A. D. 1918. Chas. Fisher, clerk, by Emma J. Fisher, deputy.

18 Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,

vs.

WASHBURN LIGNITE COAL COMPANY, Defendant in Error.

It is agreed between the parties to the above entitled action, through their respective attorneys, that the giving of a cost bond and supersedeas bond on the appeal of said action to the Supreme Court of the United States, as required by the order of the Supreme Court of the State of North Dakota allowing the writ of error in the above

entitled action, may be omitted on the part of the plaintiff in error, and that such appeal may proceed with the same force and effect in all respects as though said bond had been given.

Dated this 7th day of August, 1918.

JOHN L. ERDALL,
Attorneys for Plaintiff in Error.
MILLER, ZUGER & TILLOTSON,
Attorneys for Defendant in Error.

[Endorsed:] Filed in District Court, Burleigh County, North Dakota, Aug. 7, A. D. 1918. Chas. Fisher, clerk, by Emma J. Fisher, deputy.

19 In the Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,

vs.

WASHBURN LIGNITE COAL COMPANY, Defendant in Error.

UNITED STATES OF AMERICA,
State of North Dakota, District Court of the Sixth Judicial District, County of Burleigh, North Dakota, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

I hereby further certify that under the laws of the state of North Dakota, the files and records of all proceedings in said suit, are returned to the clerk of the trial court at the end of sixty days after final determination of said cause in said supreme court, and that the record and proceedings in the within cause were so duly returned and filed with me as clerk of the sixth judicial district, county of Burleigh in the state of North Dakota, after final determination of said cause in said Supreme Court of North Dakota, and that I am the lawful custodian of such records.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the District Court, sixth judicial District, County of Burleigh, this 15th day of August 1918.

[Seal of the District Court, Sixth Judicial District, Burleigh County, North Dakota.]

CHAS. FISHER,
Clerk of the District Court, 6th Judicial District, for the State of North Dakota, County of Burleigh.

20 In District Court, Sixth Judicial District.

STATE OF NORTH DAKOTA,
County of Burleigh:

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
A Corporation, Plaintiff,

vs.

THE WASHBURN LIGNITE COAL COMPANY, Defendant.

Notice of Appeal.

To the Above Named Defendant and to Miller, Zuger & Tillotson, Its Attorneys, and to Chas. Fisher, Clerk of Said District Court:

Take notice, that above named plaintiff appeals to the Supreme Court of the State of North Dakota from the order of the said district Court entered herein on the 18th day of August, 1917, sustaining defendant's demurrer to plaintiff's complaint herein, and from the whole of such order.

Dated this 16th day of August, 1917.

JOHN L. ERDALL,
NEWTON, DULLAM & YOUNG,
Attorneys for Plaintiff.

Personal service of the within Notice of Appeal admitted at Bismarck, N. D., this 17th day of Aug. 1917.

MILLER, ZUGER & TILLOTSON,
Attorney for Def't.

Service admitted this 18th day of Aug. 1917.

CHAS. FISHER,
Clerk of Dist. Court.

21 In District Court, Sixth Judicial District.

STATE OF NORTH DAKOTA,
County of Burleigh:

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
A Corporation, Plaintiff,

vs.

THE WASHBURN LIGNITE COAL COMPANY, Defendant.

Waiver of Undertaking.

The above named defendant by and through the undersigned, as its attorney, hereby waives the giving or serving by the plaintiff

herein of an undertaking on appeal from the order sustaining a demurrer to plaintiff's complaint entered on the 16th day of August, 1917, and further waives the making of a deposit in lieu of such undertaking.

Dated this 17th day of August, 1917.

MILLER, ZUGER & TILLOTSON,
Attorneys for Defendant.

22 In District Court, Sixth Judicial District.

STATE OF NORTH DAKOTA,
County of McClean:

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
A Corporation, Plaintiff,

VS.

THE WASHBURN LIGNITE COAL COMPANY, Defendant.

Summons.

The State of North Dakota to the Above Named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the subscriber within thirty days after the service of this summons upon you, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

JOHN L. ERDALL,
NEWTON, DULLAM & YOUNG,
Attorneys for Plaintiff.

23 In District Court, Sixth Judicial District.

STATE OF NORTH DAKOTA,
County of McClean:

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
A Corporation, Plaintiff,

VS.

THE WASHBURN LIGNITE COAL COMPANY, Defendant.

Complaint.

The Plaintiff, for its cause of action, alleges and shows as follows:

I.

That plaintiff during all of the times mentioned in the complaint, was, ever since has been and now is a railroad corporation duly

organized under the laws of the State of Minnesota and other states; and during all of said times as it was lawfully authorized and required to do it owned and operated as a common carrier a line of railroad in said state of North Dakota.

II.

That during all of the times mentioned herein the defendant was and now is a corporation engaged in the business of mining and shipping lignite coal; that during said times its mining properties and its principal place of business were and now are located at Wilton in the State of North Dakota; and that during all of the said times the defendant was and now is a citizen and resident of said State of North Dakota.

III.

That at different times between the 30th day of June 1910, and the 1st day of June 1915, the plaintiff received and transported coal by the car load for and on account of the defendant between points in North Dakota; that the defendant by reason thereof, became obligated to pay to the plaintiff the lawful and reasonable rates for such transportation; that the defendant at the times said shipments moved, ever since and now does refuse to pay to the plaintiff such lawful and reasonable rates and has only paid the plaintiff therefor the rates prescribed by Chapter 51, of the laws of the State
24 of North Dakota, for the year 1907.

IV.

The plaintiff alleges that said Chapter 51 is void for the *ra*sons: First, that it violates the commerce clause of the Constitution of the United States, Article 1, Section 8, which provides that "Congress shall have power * * * to regulate commerce with *fro*eign nations and among the several states. * * *

Second, for the reason that the maximum rate fixed by said act is unremunerative, unreasonable, inadequate and confiscatory, and violates the Fourteenth Amendment to the Federal Constitution, also Section 13 of the State Constitution.

V.

Plaintiff further alleges that after said Chapter 51 was enacted this plaintiff and other railroad companies engaged in the transportation of coal in said State of North Dakota refused to comply with said Chapter 51 on the ground that it was unconstitutional and invalid, that shortly thereafter the Attorney General of the State of North Dakota filed a petition in the Supreme Court of said State of North Dakota in a proceeding entitled State ex rel T. F. McCue v. Northern Pacific Railway Company, et al., in which, after

setting forth the facts deemed by him to be material, he duly prayed that the Supreme Court should issue its writ of injunction to restrain the plaintiff and other railway companies from violating said Chapter 51; that said plaintiff and said other railway companies appeared in said suit thus commenced by the Attorney General and made their several answers and returns in said proceeding and alleged as the reason why they should not be compelled to comply with said Chapter 51, that said Chapter 51 was unconstitutional and void for the same reasons stated in paragraph four of this complaint; that thereafter the action so commenced by said Attorney General was duly tried in said Supreme Court of the State of North Dakota, and a decision duly rendered therein which was reported in 19
25 North Dakota Reports, page 45, to which reported decision and proceedings the plaintiff begs leave to refer in this action the same as if said decision were fully plaeded and made a part of this complaint; that thereafter this plaintiff and said other railway companies duly procured from the Supreme Court of the United States a writ of Error to review said decree entered by said Supreme Court of the State of North Dakota; that thereafter said Supreme Court of the United States duly rendered its decision, which decision is reported in volume 216 of the United States Supreme Court reports, page 579 in which the latter court on the 14th day of March 1910, affirmed the said decision of said state court, "but without prejudice to the right of the railway company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal;" that immediately after the latter decision was rendered, namely, in the early part of the year 1910, this plaintiff put in force the rates prescribed by said Chapter 51 of the laws of North Dakota, and thereafter until the 1st day of June 1915, charged and collected the rates prescribed by said Chapter 51 for all coal transported by it in said State of North Dakota, and thus made an adequate trial of the rates prescribed by said Chapter 51, as suggested and directed by the decision of the United States Supreme Court referred to; that on or about the first day of July, 1911, this plaintiff having satisfied itself after an adequate trial of the rates prescribed by said Chapter 51 as aforesaid, that such rates were confiscatory, and that the confiscatory character of said rates could be established by the additional testimony which the plaintiff could offer based upon the actual trial of said rates as aforesaid, duly applied to the Supreme Court of the State of North Dakota, for leave to reopen the said case of state of North Dakota ex rel., against said railway company and others, and an order was thereupon duly entered by said Supreme Court of the State of North Dakota in said original case reopening said case and appointing a referee for the taking of
26 additional testimony therein.

That additional testimony was thereafter taken by said referee and duly returned to said Supreme Court of the State of North Dakota, and thereafter a retrial was duly had in said Supreme Court of the State of North Dakota of said *ro*iginal case and the latter Court thereafter duly made its separate findings of fact and

conclusions of law and entered judgment commanding the plaintiff and other carriers to keep the rates prescribed by said Chapter 51 in force. That the decision last refer-ed to embodying such findings of fact, conclusions of law and directing judgment was fully reported under the title of State ex rel. McCue v. Northern Pacific Railway Company, et al., 26 North Dakota reports, beginning page 438. The plaintiff begs leave to refer to the proceedings last mentioned and to the decision rendered by State Supreme Court last referred to, the same as if said proceedings and decision were fully pleaded and made a part of this complaint.

That thereafter this plaintiff duly procured from the Supreme Court of the United States a writ of error to review the judgment entered by said Supreme Court of the State of North Dakota, last mentioned; that subsequently after a full and due presentation of the matter, the Supreme Court of the United States duly rendered its decision and made its mandate which decision and mandate is reported in volume 236 U. S. Supreme Court reports beginning page 585 and ending on page 605, to which decision and proceedings in said Supreme Court of the United States last referred to the plaintiff begs leave to refer the same as if said decision and proceedings were fully pleaded and made a part of this complaint. That thereafter, to-wit: on the 11th day of June, 1915, pursuant to the mandate of the Supreme Court of the United States last referred to a final judgment was duly entered in the Supreme Court of the State of North Dakota in said original action entitled as aforesaid. That the judgment so entered among other things, duly adjudged and decreed as follows:

"1. That the judgment of this Court in this cause be and such judgment is hereby reversed and set aside.

27 2. That this action be and the same is hereby dismissed.

3. That the defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company recover against the plaintiff, the State of North Dakota, its costs herein in the Supreme Court of the United States, to-wit: $42.90, and its costs in this Court which are taxed and allowed at $——.

It is further adjudged and decreed that the clerk enter this judgment nunc pro tunc now as of June 5th, 1915."

Plaintiff alleges that the action last referred to herein was brought in the name of the State of North Dakota, and on behalf of all of the people, citizens and residents of the State of North Dakota. That the final decision and mandate of the Supreme Court of the United States, reported in volume 236 of the United States Supreme Court reports, beginning page 585, as aforesaid, and the final judgment entered by the Supreme Court of the State of North Dakota on the 11th day of June, 1915, aforesaid, pursuant to said mandate of said Supreme Court of the United States is binding upon said defendant and upon all other citizens and residents of said State of North Dakota.

VI.

Plaintiff further alleges that Section 142 of the Constitution of North Dakota is the sole authority for the legislative regulation of

rates to be charged by common carriers in said state, and that the final clause of said section 142, which is in the following words: "But the rate fixed by the legislative assembly or board of railroad commissioners, shall remain in force pending the decision of the Courts," as applied to the present case is void and inoperative because it is repugnant to and violates the fourteenth amendment to the Constitution of the United States.

VII.

That the plaintiff at the time said shipments moved, and until the 11th day of June, 1915, by reason of the mandate of the Supreme Court of the United States and the decree entered in the Supreme Court of the state in the year 1910, aforesaid, without its consent and against its will, was coerced and forced to accept and transport for the defendant, all of said shipments upon payment to the plaintiff of the rates and charges prescribed in said Chapter 51. That from and after the 11th day of June, 1915, when final judgment was entered in the Supreme Court of the state in said state case as aforesaid, plaintiff became entitled to recover from the defendant the difference between said lawful and reasonable rates and the rates prescribed by said Chapter 51 heretofore paid by the defendant amounting in all to the sum of $26,819.99 Dollars.

VIII.

That before the commencement of this action the plaintiff duly demanded of the defendant that the defendant pay to the plaintiff the said sum of $26,819.99 Dollars due *defendant* as aforesaid with interest, but that defendant has always refused and does now refuse to pay to the plaintiff any part thereof.

Wherefore the plaintiff demands judgment against the defendant for the sum of $26,819.99 Dollars with interest thereon, together with the costs and disbursements of this action.

JOHN L. ERDALL,
1427 *First National Soo Line Building,*
Minneapolis, Minn.;
NEWTON, DULLAM & YOUNG,
Bismarck, N. D.,
Attorneys for Plaintiff.

A. H. BRIGHT,
Minneapolis, Minnesota,
Of Counsel.

Due service of the within summons and complaint is hereby admitted at Wilton, North Dakota, this 7th day of May, 1917.

THE W-SHBURN LIGNITE COAL COMPANY,
By A. M. KELLER,
Its Secretary and Treasurer.

29 STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

WASHBURN LIGNITE COAL COMPANY, a Corporation, Defendant.

Stipulation.

It is hereby stipulated between the plaintiff and the defendant that as the defendant's place of business is in Burleigh County, North Dakota, the place of trial of the above entitled action be, and hereby is, transferred from McLean County, North Dakota, wherein the same is brought to Burleigh County, North Dakota.

Dated this 19th day of May, A. D. 1917.

JOHN L. ERDALL,
NEWTON, DULLAM & YOUNG,
Attorneys for Plaintiff.
MILLER, ZUGER & TILLOTSON,
Attorneys for Defendant.

30 STATE OF NORTH DAKOTA,
County of McClean:

In District Court, Sixth Judicial District.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THE WASHBURN LIGNITE COAL COMPANY, Defendant.

Demurrer to Complaint.

Now comes the defendant in the above entitled action and demurs to the plaintiff's complaint on the grounds and for the reason that said complaint on its face fails to state facts sufficient to constitute a cause of action.

Dated this 19th day of May, A. D. 1917.

MILLER, ZUGER & TILLOTSON,
Attorneys for Defendant.

Office and Post Office Address: Bismarck, North Dakota.

Due and personal service by copy of the within Demurrer is hereby admitted 21st day of May, 1917, at Bismarck, North Dakota.

JOHN L. ERDALL &
NEWTON, DULLAM & YOUNG,
Attorneys for Plaintiff.

31 STATE OF NORTH DAKOTA,
County of McClean:

In District Court, Sixth Judicial District.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THE WASHBURN LIGNITE COAL COMPANY, Defendant.

Order Sustaining Demurrer.

This matter having come on before the Court at Chambers in the court house at the city of Bismarck, in the County of Burleigh and State of North Dakota, on the 3rd day of August, A. D. 1917, pursuant to stipulation of the parties, on the demurrer of the defendant to the complaint of the plaintiff.

And the Court having heard and considered the arguments of respective counsel thereon and being fully advised in the premises, it is ordered, that defendant's demurrer to the plaintiff's complaint, to-wit: that said complaint on its face fails to state facts sufficient to constitute a cause of action, be and the same hereby is sustained.

Dated August 16th, 1917.

W. L. NUESSLE,
Judge.

Due and personal service by copy of the within Order is hereby admitted 16th day of Aug. 1917, at Bismarck, North Dakota.

NEWTON, DULLAM & YOUNG,
Attorney- for Plaintiff.

32 *Sixth Judicial District.*

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

I, W. L. Nuessle, Judge of the District Court within and for said County of Burleigh, in the Sixth Judicial District of the State of North Dakota, do hereby certify that the above and foregoing papers, to wit: Summons and Complaint of the plaintiff and demurrer of the defendant are contained in and constitute the record in the

above entitled case, and the whole thereof, in an action wherein the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, was plaintiff, and Washburn Lignite Coal Company, a corporation, was defendant.

Dated at Bismarck, North Dakota, September 24th, 1917.

W. L. NUESSLE,
Judge.

33 *Sixth Judicial District.*

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

I, Chas. Fisher, Clerk of the District Court within and for said County of Burleigh, in the Sixth Judicial District of the State of North Dakota, do hereby certify that the above and foregoing is the original notice of appeal with proof of service thereof and the original waiver of undertaking given thereon, also the original order from which the appeal is taken, with all the papers used by each party upon the application for such order, with the certificate of the judge attached thereto, in the above entitled action wherein the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, is plaintiff, and the Washburn Lignite Coal Company, a corporation, is defendant, as the same now remains of record in said Court, and the same are transmitted to the Supreme Court pursuant to said appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 24th day of September, 1917.

(Seal of the District Court.)

CHAS. FISHER,
Clerk.

34 File No. 3431.

STATE OF NORTH DAKOTA,
In the Supreme Court, ss:

Appealed from the District Court of Burleigh County.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO.,
Plaintiff and Appellant,

vs.

WASHBURN LIGNITE COAL CO., Defendant and Respondent.

This action coming on to be heard at the September, A. D. 1917, term of this Court at the Supreme Court Room, in the City of Bismarck, State of North Dakota:

Present: Andrew A. Bruce, Chief Justice; A. M. Christianson, Luther E. Birdzell, Richard H. Grace, and James E. Robinson, Associate Justices, and the appeal herein having been argued by John L.

Erdall for the appellant and by Miller, Zuger & Tillotson for Respondent, and the Court having advised thereon, it is now here considered, ordered and adjudged that the order of the said District Court within and for said Burleigh County appealed from herein, be and the same is hereby affirmed.

And it is Further Ordered, That this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the order of this Court.

And it is Further Considered and Adjudged, That Respondent have and record of the appellant costs and disbursements on this appeal expended, to be taxed and allowed in the District Court.

Dated June 12th, 1918.

By the Court.

ANDREW A. BRUCE,
Chief Justice.

Attest:

J. H. NEWTON,
Clerk.

(Seal of the Supreme Court of North Dakota.)

35 STATE OF NORTH DAKOTA,
In the Supreme Court, ss:

I, the undersigned, as Clerk of the Supreme Court, within and for the State of North Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete copy of the order of the Supreme Court of the State of North Dakota, in the above entitled action, and the same is transmitted to the District Court in and for the County of Burleigh, State of North Dakota, as the Remittitur herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 3rd day of July, A. D. 1918.

J. H. NEWTON,
Clerk.

Fees, Clerk of Supreme Court, taxed and allowed at $6.35.

(Seal of the Supreme Court of North Dakota.)

36 Copy.

In the Supreme Court, State of North Dakota, —— Term, 1917.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO., Plaintiff and Appellant,

vs.

WASHBURN LIGNITE COAL CO., Defendant and Respondent.

(In an act of the legislature passed in 1907 maximum rates were prescribed for the carriage of lignite coal. The carriers declined to

comply with the act and the State brought an action to enjoin continued violation. In March, 1910, the United States Supreme Court affirmed the decree of the state Supreme Court in favor of the plaintiff, but provided in the decree that the affirmance should be without prejudice "to the right of the railroad company to re-open the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rate for coal." After a period of experimentation the case was reopened and the injunction was continued by the State Supreme Court, but later, in June 1915, dissolved by the United States Supreme Court. In an action against the shipper to recover the difference between the statutory rate and an alleged reasonable rate for shipments made during the period between the dates of the first and second decrees of the United States Supreme Court, it is held:

(1) The action must be considered as brought upon a contract implied either in fact or law.

(2) In the absence of allegations in the complaint of circumstances from which a contract may be implied in fact, and in the absence of allegations of a promise, the complaint does not
36½ state a cause of action upon a contract implied in fact.

(3) When a statute prescribing rates is held invalid under the Federal Constitution because of its confiscatory character, it does not follow that a shipper is obliged, as a matter of law, to make reparation to the carrier.

(4) Article Fourteen of the amendments of the Federal Constitution, which provides that no state shall make or enforce any law which "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws", is a prohibition applicable to the acts of the state and does not, of itself, secure to individuals whose rights may be transgressed by the state a remedy by way of reparation.

(5) Where a decree of the highest judicial tribunal enjoins the violation of a statute and the defendant is thus coerced into complying with its provisions, and where no conditions are imposed upon these in whose favor the decree operates as a prerequisite to obtaining the benefits of such decree, any damage done the defendant by the operation of the decree is damnum absque injuria.

(Syllabus by the Court.)

Appeal from District Court, Burleigh County, W. L. Nuessle, J. Affirmed.

Opinion of the Court by Birdzell, J.

John L. Erdall, Minneapolis, Minn., Attorney for Appellant.

A. H. Bright, Minneapolis, Minn., John E. Greene, Minot, N. D. and Dullam & Young, Bismarck, N. D. of Counsel for Appellant.

Miller, Zuger & Tillotson, Bismarck, N. D., Attorneys for Respondent.

37 BIRDZELL, *J.*: This is an action to recover the difference between the statutory rate upon certain coal shipments and an alleged reasonable rate. It arose upon the following facts:

In the year 1907, the legislature of North Dakota passed a statute prescribing a schedule of maximum rates to be charged for hauling lignite coal. When the law went into effect the carriers declined to comply with it, whereupon an action was brought to enjoin the continued violation. In this action, the carriers were unsuccessful. (State of North Dakota ex rel McCue v. Northern Pacific Ry. Co., 19 N. D. 45, and State of North Dakota, ex rel T. F. McCue, v. Northern Pacific Ry. Co., 216 U. S. 579. A supersedeas having been obtained, the statutory rate was not put into operation until after the decree of the United States Supreme Court, in March, 1910. The case was later reopened in accordance with the terms of the decree and additional evidence taken. It was then determined by this court that the statutory rates were reasonable, but it was ultimately held by the United States Supreme Court that the rates were confiscatory. (State of North Dakota ex rel McCue v. Northern Pacific Ry. Co., 26 N. D. 438; State of North Dakota ex rel McCue v. Northern Pacific Ry. Co., 236 U. S. 585.) The portion of the complaint which states the alleged cause of action is as follows:

"That the plaintiff at the time said shipment moved, and until the 11th day of June, 1915, by reason of the mandate of the Supreme Court of the United States and the decree entered in the Supreme Court of the state in the year 1910, aforesaid, without its consent and against its will, was coerced and forced to accept and transport for the defendant, all of said shipments upon payment to the plaintiff of the rates and charges prescribed in said Chapter 51. That from and after the 11th day of June, 1915, when final judgment was entered in the Supreme Court of the State in said state case as aforesaid, plaintiff became entitled to recover from the defendant the difference between said lawful and reasonable rates and the rates prescribed by said Chapter 51 heretofore paid by the defendant amounting in all to the sum of $26,819.99."

38 It will be noted that the complaint alleges that, by reason of the decree of the United States Supreme Court, the plaintiff was coerced and forced to accept and transport shipments for the defendant at rates prescribed by Chapter 51 of the Session Laws of North Dakota for the year 1907. The remainder of the paragraph merely states a legal conclusion to the effect that, by reason of said shipments, the plaintiff became entitled to recover from the defendant the difference between a reasonable rate and the rate prescribed by the statute, which right is alleged to have arisen on June 11th, 1915. It will be observed that it is not alleged that the defendant performed the services under protest or under any sort of legal compulsion, except such as was imposed by the mandate of the Supreme Court of the United States. The decree referred to affirmed that of this court, granting an injunction to prevent the violation of the statute, and the opinion of the court concluded as follows: (Northern Pacific Ry. Co. v. North Dakota, 216 U. S. 579-581) "We do not say that experiment may not establish a case in the future that would require a decision upon the question of constitutional law, but we can express no opinion upon it now. The great difficulty

in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned is well known and often has been remarked. It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of Wilcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. Rep. 192, as nearly as may be, and affirm the decree, but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings, if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal." Following the entry of the above decree, the statutory rate was put into effect in conformity with the judgment.

The pertinent inquiry is: what is the basis for the legal conclusion that, by reason of the shipments, the plaintiff became entitled to recover from the defendant? It is elementary that a pleading which states legal conclusions merely does not state a cause of action; it must state facts from which the legal conclusion of liability follows. It is equally elementary that the facts stated must bring the plaintiff within the operation of some rule of substantive law, according to which a liability may be found to exist. Obviously, the relations between a carrier and a shipper are governed by the same basic principles that would control were they between individuals and relate to matters not commonly subject to the regulatory power of the state. A departure from these principles in the case of carriers is only to be countenanced when their application threatens to embarrass, or does actually interfere with, the exercise of the regulatory power of the government in the interest of justice and equality. Thus, the liberty to contract for the services of a carrier is generally interfered with to the extent necessary to prevent discrimination as between patrons. But we are aware of no rule or policy that requires a determination of this case upon any principle peculiar to the relations of public carriers. It being clear that the liability contended for is not a tort liability, before a recovery can be had it must be found that the defendant is indebted to the plaintiff under an obligation in the nature of a contract. This brings us to a consideration of the circumstances alleged in the complaint, and those reasonably inferable from the facts there alleged, for the purpose of determining first; whether there was any contract, express or implied in fact, for the payment of the difference sought to be recovered; and second, whether, in case no contract in fact is alleged, the complaint states facts from which it must be held that there was a legal obligation in the nature of a contract obligation, which could be enforced in this action.

If it be assumed that the shipper acted at all times with full knowledge of the litigation and of its ultimate result, could it then be further assumed that he agreed in fact to pay for the services at a higher rate than that fixed by statute if, perchance, the decree should be modified or reversed at some subsequent time? We think not. A business man acting with full knowledge of the fact that the law in question had been attacked and that

those interested in stopping its action had been defeated after prolonged litigation carried to the highest court in the land, would, we believe, be more apt to assume that he was justified in dealing with the carrier on the hypothesis of the validity of the law, and, in the absence of express protest, that the services of the carrier were rendered voluntarily. By "voluntarily" in this connection is meant in voluntary obedience to a supposed law. Sections 4339-4342 of the Revised Code of 1905 (Sections 4724-4727, Compiled Laws of 1913) require, among other things, that the carriers shall print and keep for public inspection schedules showing the rates which are in force at the given time, and they are required to file such schedules with the railroad commission. Manifestly, if shippers cannot rely upon the rates as so published and filed, the requirement of publication becomes a mere trap for the unwary. In our judgment, it is wholly improper, in the absence of clear allegations of the rendition of services under a distinct protest, for a court to find that a shipper had, in effect, undertaken, conditionally to pay, according to a rate different from that published in compliance with the statute. The foregoing considerations lead inevitably to the conclusion that there was no contract in fact, either express or implied, to pay any rate other than the statutory rate, and that which, from the entry of the decree forward, must be presumed to have been filed and published in accordance with the provisions of Section 4727, C. L. 1913, Revised Code of 1905, Section 4342. This should dispose of the complaint, insofar as it may be thought to state a cause of action upon a contract either express or implied in fact.

But it is urged that the obligation to pay a reasonable rate arose as a matter of law, regardless of any express contract or any contract which might have been implied in fact. But this contention is without merit, for the reason that the elements essential to the implication of a contract in law are likewise lacking. Where there is no contract in fact, either implied or express, the law will
41 not imply one except to support a recovery in favor of a plaintiff on the principle that the defendant has been unjustly enriched at his expense. "While authorities in point are singularly lacking, the controlling principle is clearly the same as in case of mistake, and it is elementary that where the defendant is free from responsibility for plaintiff's mistake, or is responsible in no greater degree than the plaintiff, and where his position is such that the enforcement of restitution would subject him to loss, the defendant is entitled to retain whatever benefit he has derived from the mistake. (Woodward on the Law of Cuasi Contracts, Section 20.) In such cases it may be unfortunate that the law does not attempt to distribute the loss; but, until some other basis for recover- than that of unjust enrichment is established, the party who has sustained the loss must bear it. To allow the plaintiff to recover in this action is to visit the consequences of the wrong imposed without the fault of either upon one who would be incapable of obtaining reparation from those who are probably the real beneficiaries of the wrong—the consumers of the commodity.

It frequently happens that the risk of certain contingencies affecting a transaction must, as a matter of law, be held to be borne by one party rather than the other. The law always leaves a loss where it finds it, unless there is something to indicate that there was an intention to the contrary, or unless it distinctly fixes the burden otherwise. The situation of the plaintiff in the case at bar is very much the same as that described by Justice Learned in the case of Winbiel v. Carroll, 16 Hun. (N. Y.) 101, wherein he stated: (page 103): "Ignorance of the fact is one thing; ignorance of the means of proving the fact is another. When money voluntarily paid is recovered back, (and this would be no less true as to services rendered), it is because there was a mistake as to some fact, But here the plaintiff was not mistaken as to the fact. Only at the time he did not know how to prove it. The subsequent discovery of evidence to prove the fact, known to the party when he makes the payment, cannot authorize a recovery back of the money. Such a
42 principle would be most dangerous." In the case at bar, the plaintiff, from the beginning of the proceedings involving the rate, professed knowledge of the facts upon which its invalidity was ultimately determined. But apparently it was not able to choose the appropriate means of proving these facts. It cannot be said to have supplied its services under a mistake as to the facts, and we can see no just reason for allowing it to shift the burden of the experiment to the shipper.

As a further test of the plaintiff's position, it is proper to inquire what the situation would be had the suit to determine the constitutionality of the rate statute been begun by the carrier as one to enjoin the execution of the law. Had relief been denied in such a proceeding, and later, after a reasonable period of experimentation, had the injunction been issued by the United States Supreme Court, preventing the state officers from enforcing the law, manifestly the "coercion", compelling the carrier to apply the statutory rate during the period of experimentation, would not have been of a judicial, but rather of a legislative character. Its position would have been precisely that of any individual who yields obedience to an unconstitutional law and sustains a loss in so doing. It could not shift this loss to another who was justified in contracting with it upon the supposition that its yielding was voluntary.

If obligation rests upon the defendant as a matter of law it is wholly because of the fact that the State of North Dakota, through its legislature, has denied to the plaintiff rights secured to it by the Fourteenth Amendment to the Federal constitution. It must be born in mind that the amendment is intended as a security against any action by the state which may result in the confiscation of property. It does not secure to the individual or the corporation any particular remedy for the enforcement of the right, but it presupposes that ordinary legal remedies will be adequate. If however, supplementary action is deemed necessary in order to give greater security. Congress is given authority to make appropriate provision to that end. The Civil Rights cases have amply defined

the powers of Congress in this connection. (Civil Rights Cases, 109 U. S. 3; 3 S. C. 18, 27 L. Ed. 835.) In legal theory, the
43 remedies provided to prevent the violation of the rights secured are adequate. They are the usual remedies available in State and Federal Courts, and they have never been extended so as to embrace cases of civil liability flowing incidentally from prohibited state action. The right to so extend them is even denied to Congress. (Civil Rights cases, supra). Nothing is clearer than that the amendments, (Thirteenth, Fourteenth and Fifteenth) do not comprise a code of remedial law, according to which reparation may or must be made for every temporary denial of a right so secured, and that the amendments spend their force in permitting state action to be set aside when it involves a violation of the amendments and when the right is sought to be vindicated in the ordinary channels. The remedial law, as between individual suitors, is left entirely untouched and remains subject to such imperfections as are inherent in a judicial system that is compelled to respect practical considerations in measuring individual rights. Theoretically, there would be no occasion for fastening a liability upon an individual defendant because a state had confiscated the plaintiff's property. The Fourteenth Amendment contemplates that such action can and should be entirely by a resort to appropriate legal remedies.

Insofar as the complaint may be based upon a supposed right to collect, a reasonable rate during the period of experimentation, it entirely ignores the effect of the decree of the United States Supreme Court. While the decree was based upon evidence covering a certain period of time, and in this sense looks backward, it nevertheless operated in the future as well. In reality, the plaintiff's whole case seems properly hinged upon the real meaning and effect of the first decree of the United States Supreme Court.

44 The matter that was settled in that suit was the right of the state to an injunction, and it was found that the state was entitled to the relief sought. Neither the state court nor the United States Supreme Court saw fit to impose any terms or conditions. Thus, so far as the party adverse to this defendant is concerned, the decreeing of the mandatory injunction was absolute and its effect was to compel the plaintiff herein, among others, to apply the statutory rate until such time as it might obtain relief from the terms of the decree, at the peril of contempt of court. The decree was not interlocutory in any sense, but final; nor do we find that there is anything in the subsequent decree of the same court dissolving the injunction and nullifying the statutory rates which amounts to a qualification of the original decree, except as to the future. (State of North Dakota ex rel. McCue v. Northern Pacific Ry. Co., 236 U. S., 585.)

While the Supreme Court of the United States, in the case of Missouri v. Chi. Burl. & Quincy Ry. Co., 241 U. S., 533, explained quite thoroughly the meanin*t* of a decree as the one involved here, it expressly refrained from deciding whether or not excess rates paid pending a decision as to the constitutionality of a rate fixing statute

were recoverable in the absence of a condition to that effect, imposed when the injunction was issued. So that, in dealing with this question, we must dispose of it without an authoritative interpretation of the original decree by the Court which entered it. But in the light of well considered precedent, we think it- correct interpretation is that the decree was absolute and bound the plaintiff herein for the time being, and also that the damages flowing therefrom were within the rule of damnum absque injuria. In the case of Russel v. Farley, 15 Otto (U. S.) 433, 105 U. S., —, 26 L. Ed., 1060, Mr. Justice Bradley stated the principle of non-liability in such a case as follows: "Where no bond or undertaking has been required, it is clear that the Court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of the suit as it may deem equitable and just. * * *, and if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of the court itself is damnum absque injuria, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon and arises from the discretion which the court has in such cases, to grant or not to grant the injunction applied for. It is a power inherent in the court as a court of equity and has been exercised from time immemorial."

Where the enforcement of a statutory rate is enjoined, pending an ultimate determination of its validity, the proceedings from the beginning are predicated upon the right of the shippers to command the services at the rate prescribed, and the injunction is only issued to prevent irreparable loss in case the prescribed rate is ultimately held illegal. It follows from this that, when such a suit is determined adversely to the carrier, the shipper may recover whatever difference there may be between the statutory rate and the rate collected during the progress of the suit. But it is nevertheless appropriate for the Court, in enjoining the operation of a statute, to require a bond as an added protection. The right of action upon the bond, however, is not exclusive. (Bellamy v. St. Louis, Quincy & L. Ry. Co. 220 Fed., 876.) Where, on the other hand at the end of an unsuccessful suit, the carrier is restrained from violating the terms of a rate statute, it is manifest that any damages it may sustain through compliance with the injunction are not recoverable. Were the rule otherwise, the injunction, which is merely a continuing expression of the judgment of the court that the statutory rate must be applied, is a judgment deprived of its force as an adjudication of the rights of the parties. The error in the plaintiff's contention inheres in the failure to recognize the injunction as being the continuing expression of the court until such time as it may be modified or dissolved by a

new judgment or decree. During such time it is impossible
46 that there could have been any other measure of the rights and obligations of the parties than that provided in the decree itself.

Insofar as the practice of the United States Supreme Court, in qualifying decrees in rate cases as being "without prejudice," sheds light upon the question in hand, it seems to indicate that the transactions following the entry of such a decree shall be controlled by the prescribed rate where a decree enjoining it has been reversed, or by a rate otherwise lawfully fixed where a decree enjoining the prescribed rate has been affirmed. In the first cases in which such decrees were entered (Knoxville v. Water Co. 212 U. S., 1; Willcox v. Consolidated Gas Co., 212 U. S., 19) decrees of the lower courts enjoining the prescribed rate were reversed and the causes remanded with directions to dismiss the bills without prejudice. The entry of such decrees was thought appropriate for the reason that practical experience with the rates in actual operation might result in enabling the companies affected to show, as they had not previously been capable of demonstrating, the confiscatory character of the rates. In Louisville v. Cumberland Tel. & Tel. Co., 225 U. S., 430, it was simply stated that the whole question was so much in the air that the court did not feel authorized to let the injunction stand; consequently the decree was reversed "without prejudice." In the case of Des Moines Gas Co. v. Des Moines, 238 U. S., 153, while the court affirmed the decree of the lower court, dismissing the bill of the utility company, it modified the order to the extent of providing that the dismissal should be "without prejudice." This modification was made in "view of the fact that ordinarily time alone can satisfactorily demonstrate. * * * whether or not the rates established will prove so unremunerative as to be confiscatory in the sense in which that term has been defined in rate making cases." In all of the foregoing cases, it will be *b*oted that the qualification "without prejudice" was attached to a final order of dismissal. In the Missouri Rate Cases, 230 U. S., 474, and in the North Dakota rate case, Northern Pacific Ry. Co. v. North Dakota, 216 U. S., 576, the final decrees seem to pre-suppose the continued pendency of the litigation.

47 In three of the Missouri rate cases, where the injunction against the statutory rate was allowed to stand, the court provided that "the Railroad and Warehouse Commissioners, and the Attorney General of the state, may apply at any time to the court by bill or otherwise, as they may be advised, for a further order or decree whenever it shall appear, that by reason of a change in circumstances, the rates fixed by the State's Acts are sufficient to yield to these companies sufficient compensation for the services rendered." A similar decree was entered in the North Dakota case, where the court allowed the statutory rates to continue in effect. Whether the order be one dismissing a bill "without prejudice" or whether it be in the nature of a modification of a final decree permitting subsequent proceedings in the same case, it seems to be interpreted as affecting the rights of parties in the same way. In Missouri v.

Chi. Bur. & Quincy Ry. Co., 241 U. S., 533, in answering the contention that the reservation "without prejudice" left the whole subject open for renewed attack. The court, speaking through Chief Justice White, stated that the proposition contended for disregarded "the foundation upon which such a reservation came to be applied," and further criticised the contention on the ground that it treated "the reservation without prejudice" as looking backward and overthrowing that which was precluded by the decree instead of considering it in its true light, that is, as looking forward to the future and providing for conditions that might then arise."

The foregoing reference to the qualified decrees and to the reason which seems to have moved the court to enter them seem to indicate clearly that, while the decree was absolutely binding as an adjudication of the rights of the parties down to the time of its entry, it also had the effect of letting the future take care of itself. As to the future, therefore, adopting the *constitution* of the decree most favorable to the plaintiff in this suit, it has simply rendered the service at a rate which both the legislature and the judiciary have determined to be applicable, and it has rendered the service without any other contract on the part of the shipper than would arise
48 from the mere delivery of his goods for transportation according to the prescribed rates. The prescribed rates are either applicable or they are not applicable at the time the goods are delivered for shipment. The legislature and the Supreme Court of the United States have considered that they are applicable, and during the period embraced in this controversy it is inconceivable that either the shipper or the carrier should have been allowed to question it, except in the manner allowed by the Supreme Court. When that court finally dissolved the injunction, it did not reverse its prior judgment, nor, it seems to us, did not profess to give to the carriers any rights with respect to past shipments that did not exist at the time they were made. These rights were governed by the former decree.

This case is readily distinguishable from that of Merrick Co. v. M'p'l's, St. Paul & St. Ste. M. Ry. Co., 35 N. D., 331; 160 N. W., 140. In that case the shipper was allowed to recover the difference between the rate prescribed and collected by the carrier and the statutory rate upon shipments made after the statute went into effect and before the carrier was restrained from violating the statute; whereas, here, the carrier seeks to recover for having done exactly that which it was compelled to do by the decree of the court as a condition to being permitted to secure a dissolution of the injunction. In a case in which a shipper has been permitted to recover the difference between a rate charged and some lower rate, the result has been merely to give to the shipper the benefit of a violated regulatory measure, with which the carrier was not, for the time being, complying. For all purposes of such a situation the regulatory provision fixes the absolute criterion of reasonableness, and, it having been prescribed by competent authority, a departure therefrom is a distance breach of the obligation of the carrier.

49 In the case at bar, the effect of the first judgment of the United States Supreme Court was to fix a criterion of reasonableness based upon the statute which should control until the decree might subsequently be modified.

In addition to the reasons assigned, there are strong practical considerations which weigh against the maintenance of an action such as the one at bar. In the case of Van Patten v. Minneapolis, St. Paul & St. Ste. Marie Ry. Co., 81 Fed., 545, which was a suit to recover damages on the ground that the charges exacted by the carrier were unreasonable, it was held that it was competent and proper for the carrier to show in defense that, in obedience to the Interstate Commerce Act, it adopted, printed and posted a schedule of rates, and that the charges complained of were in accordance with those contained in the schedule. Commissioner Prouty of
50 the Interstate Commerce Commission later criticised this result (Cattle Raisers' Association v. Ft. Worth and D. C. Ry. Co., 7 I. C. C. Rep., 513-553), on the ground that under the Interstate Commerce Act, as it existed at that time, the effect of the decision was to entirely cut off the right to recover any portion of an excessive or extortionate charge. Conceding that the opinion referred to would, under the then existing state of the law, have had the effect pointed out by Commissioner Prouty, it may be open to the criticism of being extreme. But the practical considerations referred to by Judge Shiras afford persuasive reasons for holding the first decree of the United States Supreme Court to have been binding upon the parties until changed, and the damages incident to a compliance therewith to come within the rule of damnum absque injuria. Judge Shiras, in the case referred to (page 551), said: "In the present case, however, the proposition of the plaintiff is that, after the carrier, in obedience to the requirements of the act, has adopted, printed and posted a schedule of rates (which was done in this case under Section 4727, C. L. 1913), and for the past five years has received and transported grain, charging the schedule rates therefor, and the shipper, without protest or demur, has delivered his grain for shipment, knowing the schedule rate, and has paid the charges in conformity with the established rate, he may now, and at any time within the period of the statute of limitation, bring an action at law for damages, or that the schedule itself provided for unequal, and therefore unjust, rates, but solely upon the ground that the schedule rates, though uniform, and properly proportioned, were greater than they should have been; and thus the question is presented whether the interstate commerce act, considered as a whole authorizes and provides for an action of this kind. It *if* can be maintained, it results in the holding that it was the intent of Congress to place upon the courts and juries of the country the duty and burden of establishing the rates of transportation for interstate commerce, and upon the common carrier the burden of transportation, with the right to ultimately retain as pay therefor

the rate fixed by the verdict of a jury rendered perhaps
51 five years after the rendition of the services. How is it possible for a jury to pass understandingly upon the question which inheres in the establishment of a properly proportioned and equalized schedule of transportation rates? * * * Now the theory of the plaintiff is that the jury must inquire into and determine what the reasonable rate was for each shipment when made, and by comparing the reasonable rate thus fixed by the jury with that actually charged, to determine whether the plaintiff is entitled to damages, and, if so, to ascertain the amount of each shipment made. It is self-apparent that, no matter how intelligent the jury might be, nor how conscientiously and carefully they might endeavor to deal with the problem thus submitted to them, it would be wholly impossible for them to reach a proper verdict under such circumstances.

"But suppose the case involved but a single shipment, would the difficulty be remedied, if the theory of the plaintiff is to prevail? How could the jury fairly and understandingly deal even with the case of a single shipment, provided the duty is placed upon the jury of determining what a fair and reasonable charge for the particular service would be, unless some standard, already recognized and established, is given them for their guidance? It is impossible for the jury to deal with the questions of the total cost of building, equipping, and operating the line of a railway as a whole, the proportionate cost of the particular transportation in question, the total amount of business done over the entire system, the total burden properly to be laid upon the total business for transportation charges, and the proper proportionate share which the particular shipment should bear."

It is true that these practical considerations should not have weight as against a clear legal right, but since they inhere in, and are so thoroughly characteristic of the particular matter in controversy, it is only reasonable to suppose that they were present in the mind of the court when the decree in question was entered and that the court purposely granted the relief unconditional as to the
52 consequences of a possible future modification. Surely the United States Supreme Court did not intend that, during the entire period its first decree should be in operation, the parties whose business would be affected favorably or *in*favorably by the experiment should be left to the uncertainties incident to numerous subsequent jury trials in order to determine the rate applicable to shipments of coal.

The order appealed from is affirmed.

L. E. BIRDZELL,
ANDREW A. BRUCE,
RICHARD H. GRACE.

53 MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. CO.

VS.

WASHBURN LIGNITE COAL CO.

CHRISTIANSON, *J.* (Concurring specially:)

It was stated upon the argument by counsel for both parties that no objection was made because of any mere technical or amendable defect in the complaint. The defendant asserted and stood squarely upon the proposition that the complaint on its face showed clearly that no cause of action existed or could exist against it under the facts pleaded. And that this, and this alone, was the theory on which the demurrer was interposed and on which it has been argued in the court below, and on which it was asserted in this court.

The questions presented in this case are by no means easy to determine. That the constitutional rights of the plaintiff have been infringed upon and its property taken without due process of law cannot be denied. The rate statute became effective July 1st, 1907 (19 N. D., 46). It was sustained by the decision of this court, filed April 16th, 1909 (19 N. D., 46). This judgment was affirmed by the United States Supreme Court in a decision filed March 14th, 1910 (216 U. S., 579; 54 L. Ed., 624). The case was subsequently reopened and the carrier submitted proof of the receipts and expenses chargeable against the lignite coal traffic for the year commencing July 1st, 1910, and ending June 30th, 1911 (26 N. D., 438). Upon the proof thus submitted the United States Supreme Court held the rate confiscatory and violative of the Fourteenth Amendment (236 U. S., 585; 59 L. Ed., 735).

In a subsequent case, involving the right of a shipper to recover a sum paid in excess of the statutory rate, it was demonstrated, or rather it was conceded, that there was no substantial change in the cost of handling the intrastate lignite coal traffic on the line of the plaintiff railroad at any time between the first day of July,
54 1907, and the first day of July, 1911 (Merrick Co. vs. Minn., St. Paul & Sault Ste. Marie Ry. Co., 35 N. D., 331, 338). Hence, it is established by former adjudications that the rate established by the statute was, in fact, as to the plaintiff confiscatory at all times.

It is indisputed that the plaintiff consistently and vigorously asserted that the statutory rate was confiscatory. It refused to put the rate into effect and resisted the efforts of the state authorities to do so as long as possible. It put the rate into effect only when it has been commanded by the decree of this court, and of the Supreme Court of the United States to do so. Such decree was entered in an action brought on behalf of the State of North Dakota by its attorney general, and such decree necessarily inured to the benefit of the shippers or consumers of lignite coal. A final decree in such action would doubtless be res judicata upon the railroad company on the

one hand, and those represented by the attorney general, i. e., the state and its people, on the other hand. The only logical and reasonable deduction that can be drawn from the undisputed facts in this case are that the plaintiff did not put the statutory rate into operation, or voluntarily transport coal at the statutory rate, but did so involuntarily and solely because it could no longer refuse to do so without violating the decree of this court and thereby subjecting itself to penalty. It seems clear to me that under such circumstances it cannot be said that the actions of the carrier in accepting and transporting shipments of coal were voluntary, or the contract of carriage freely and voluntarily made. In order that there may be a valid contract, the parties must consent thereto and the consent must be free and mutual. The plaintiff had no option. It could not refuse to accept shipments of coal, but "it must, if able to do so, accept and carry" the coal offered to it for transportation, and transport the same over its lines. Sec. 5673, R. C. 1905 (Sec. 6236, C. L. 1913). It was compelled, by the act of the legislature and the judicial decree, to accept and carry intrastate shipments of lignite coal at a confiscatory rate, and it was forbidden under penalty to charge a compensatory rate for performing such service.
55 And if it refused to accept and transport shipments at the confiscatory statutory rate and exacted a compensatory one, the shipper might sue and recover the amount exacted in excess of the statutory rate. (Merrick Co. vs. M., St. P. & S. S. M. Ry. Co., 25 N. D, 331, 338). The inevitable result was that by virtue of the legislative enactment and the judicial decree the plaintiffs' property was taken away and handed over to others, without compensation, in violation of constitutional guaranty. This is indisputably established by, or necessarily inferred from, the facts alleged in the complaint.

That a party may recover excessive payments exacted from him by a common carrier for the transportation of goods, under such circumstances as to indicate that the payment was involuntary, is well settled. And, ordinarily, excessive charges paid under protest to a common carrier having goods in its possession, in order to secure possession of the goods, may be recovered. Such payments are generally recognized as being under duress, sometimes termed "duress of goods." (See cases cited in note to Ill. Glass Co. vs. Chicago Telephone Co., 18 L. R. A. (N. S.), p. 124.) There is another class of cases more nearly peculiar to public service corporations in which the courts allow recovery of excessive payments made, not under duress, but under public necessity resulting from the unequal relation of the parties and the dependence of the individual upon the services in carrying on his business. (See cases cited in note to Ill. Glass Co. vs. Chicago Telephone Co., 18 L. R. A. (N. S.), p. 124.)

It would seem to follow as a necessary corollary to the rule stated that where a common carrier is compelled to carry goods at a confiscatory rate under such circumstances as clearly to indicate that the service was performed involuntarily, it ought to be entitled to

recover from the person who received the benefit of such involuntary service the difference between the amount received and what would amount to a reasonable compensation for the service performed.

But is the right of the carrier (if any) to recover concluded by the decree putting the rate into effect? At the time the case of Merrick Co. vs. M., St. P. & S. Ste. M. Ry. Co., supra, was submitted the writer was inclined, as were (in fact, all the members of
56 this court), to hold that the first decree, which was qualified as "without prejudice," had been superseded by the final decree. And that the rights of the parties in the Merrick case must be measured by the final decree in the rate case. But while the Merrick case was pending for decision, the Supreme Court of the United States handed down a decision in Missouri vs. C. B. & Q. R. Co., 241 U. S., 533; 60 L. Ed., 1148. In that case the court held that a decree in a rate case, although qualified "as without prejudice, did not leave the controversy open as to the period with which the decree dealt and which it concluded, but in order not to prejudice the rights of property in the future, if from future operations and changed conditions arising in such future it resulted that there was confiscation." And that the reservation "without prejudice" was to be considered "as looking forward to the future and providing for the conditions which might then arise." If this is correct, and if such decree conclusively establishes the validity of the rate during the period prior to its rendition, regardless whether such rate is in fact confiscatory, then the rate so established ought to be deemed valid until the decree is set aside and the rate adjudged to be confiscatory. For, as to the period prior to the rendition of the decree, the parties realize that the validity of the rate is being questioned and its confiscatory character is being asserted by the carrier, while thereafter, and as to the period intervening between the date of the rendition of the decree sustaining the rate and the reopening of the case and the subsequent adjudication of invalidity, the shippers know that the rate had been established, not only by legislative enactment, but by judicial decree. This may be illustrated by applying the rule to concrete cases. Thus, in the Merrick case the carrier refused to accept and transport the coal at the statutory rate for the avowed reason that such rate was confiscatory, and exacted from the shipper a compensatory rate. At the time of the shipment, the shipper knew that the validity of the rate was being questioned, and it was in a position to, and probably did, include the rate paid in fixing the price of the coal. In the instant case, the defendant coal company knew that the statutory rate had been sus-
57 tained by the decree of this court and of the United States Supreme Court against attacks by carrier on the ground that it was confiscatory. And it probably fixed the price of the coal in view of the prevailing freight rate.

It may also be observed that, although the plaintiff's complaint shows that its property has been taken away and handed over to others without just compensation, it does not show, nor can it rea-

sonably be inferred, that plaintiff's loss was occasioned by any act of the defendant. On the contrary, it appears that such loss was occasioned by the actions of the legislature and of the courts. It would have been possible to have protected the rights of the plaintiff, as well as of the shippers, by proper provisions in the first decree, but no such provision was made. And while it is apparent that plaintiff has sustained loss, and that someone has received a benefit corresponding to such loss, it does not necessarily follow that the defendant received such benefit. It is quite as, and in fact more, likely that the freight rate was reflected in the price of the coal, and that the benefit of the decreased rate was received by the purchasers and consumers of the coal.

The order sustaining the demurrer should be affirmed.

A. M. CHRISTIANSON.

58 SOO RY. COMPANY

vs.

WASHBURN LIGNITE COAL CO.

ROBINSON, *J.* (Dissenting:)

This is an appeal from an order sustaining a general demurrer of the complaint. It avers that at different times between the 30th day of July, 1910, and the first day of June, 1915, the plaintiff received and transported coal by the carload for the defendant between points in North Dakota; that the defendant by reason thereof became obligated to pay to the plaintiff the lawful and reasonable rates for such transportation; that the defendant has at all times refused to pay such reasonable rates and has paid only the rates prescribed by Chapter 51 of the Laws of 1907. It avers that the plaintiff refused to comply with Chapter 51 and the Attorney General bro't a suit to compel such compliance. The State Supreme Court sustained the same (19 N. D., 45). The U. S. Supreme Court affirmed the decision without prejudice because of defective proof (216 U. S., 579). That by reason of said decisions and by compulsion during part of the year 1910 and until June, 1915, the plaintiff put in force the rates prescribed by Chapter 51. That in July, 1911, on due application the State Supreme Court made an order re-opening its judgment and appointing a referee to take additional testimony and on such testimony it was again adjudged that the plaintiff keep the rates prescribed by Chapter 51 (26 N. D., 438). That on June 11th, 1915, the judgment of the State Court was reversed and the action dismissed with costs, $1,878.82 (236 U. S., 585).

The complaint avers that Section 142 of the State Constitution is the sole authority for the regulation of rates and it provides that the rate fixed by the legislative assembly or board of railroad commissioners shall remain in force pending the decision of the courts, and that during the time of said shipments until July, 1915, by reason of the wrongful mandates of the courts the plaintiff was compelled to accept and transport coal at the rates fixed by Chapter 51, which

rates were not reasonable. And that at reasonable rates for the
59 services rendered for the defendant, at its request there is due to the plaintiff an additional sum in excess of $26,000.

Disregarding some errors and ommissions which counsel agree to waive, the complaint fairly shows that the plaintiff performed services for the defendant at its request in the transportation of coal and that by compulsion the plaintiff accepted for such services $26,000 less than the reasonable value of the same and the defendant has refused to pay sich reasonable amount. Not it is manifest that if one party may compel another to perform services at less than the reasonable value of the same, he may compel performance without any value at all. If a party may take the services or the property of another without just compensation, he may take it without any compensation and that is simply robbery. Of course, if the plaintiff voluntarily performed the services for the compensation received—as contended by the defendant—then it cannot recover an additional sum. The defense contends that at the date of the first decree of the U. S. Supreme Court, the statutory rate was lawful because it was not adjudged unlawful on the testimony submitted but in that there is a falsity. If Chapter 51 fixed the rate at half the reasonable value or less than the reasonable value, the rate never became lawful by reason of a failure to make proof or the necessity of an experiment to demonstrate the fact. It is quite possible that on a trial the evidence may shoe that the services were voluntary and made without protest at the compensation fixed by statute, but the averments of the complaint are otherwise.

Here is a fine specimen of specious reasoning. It must be conceded that at the date of the first decision of the United States Supreme Court, the statutory rate was lawful. Therefore the decree declaring the same lawful was not erroneous and therefore said decree only compelled the plaintiff to obey a valid law. Can it be said that a decree of a court compelling the defendant to comply with the valid law is coercive?

The question is: was the law valid? If it was a valid law at the time of the first decree, it was valid at the time of the second
60 decree and it has always been valid. If a statute was void at the time of the second decree, it was equally void at the time of the first decree tho' the evidence failed to show it. The first decree was expressly based on the failure of proof regarding the reasonable value of the services. Hence, on the question og the constitutionality of the law, the U. S. Supreme Court expressly declined to xpress an opinion. When the case was re-opened and further testimony submitted, the court held that: "The maximum rates fixed by Chapter 51 are unreasonable requiring the carrier to transport the commodity at a loss and that the state exceeded its authority in enacting the statute which amounts to an attempt to take the property of the carrier without due process of law in violation of the Fourteenth Amendment." (236 U. S., 586).

The complaint shows by force of this statute and the court decisions, the plaintiff has been compelled to carry loads of coal for defendant at a loss or without just compensation and that such loss

amounts to over $26,000. Hence, the complaint does state a good cause of action.

Order sustaining demurrer should be reversed.

Nov. 14th, 1917.

J. E. ROBINSON,
Judge of the Supreme Court.

61 File No. 3431.

STATE OF NORTH DAKOTA,
In the Supreme Court, ss:

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff and Appellant,

vs.

WASHBURN LIGNITE COAL COMPANY, Defendant and Respondent.

Appealed from the District Court of Burleigh County.

STATE OF NORTH DAKOTA,
In the Supreme Court, ss:

I, the undersigned, Clerk of the Supreme Court of the State of North Dakota, do hereby certify that the above and foregoing is a full, correct and complete copy of the opinion of the Supreme Court of the State of North Dakota, in the above entitled action, as the same remains on file in my said office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Bismarck, this 15th day of August, A. D., 1918.

[Seal of the Supreme Court of North Dakota.]

J. H. NEWTON,
Clerk of the Supreme Court.

62 STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
a Corporation, Plaintiff,

vs.

THE WASHBURN LIGNITE COAL COMPANY, Defendant.

Notice of Application for Judgment.

To the above named plaintiff, and to John L. Erdall, Esq., and Messrs. Newton, Dullam & Young, its attorneys:

Please take notice that the defendant in the above entitled action will apply to the District Court of Burleigh County, North Dakota,

at Chambers at the court house in the city of Bismarck, in said County and State, on the 1st day of August, A. D. 1918, at two o'clock P. M. on said day, or as soon thereafter as counsel can be heard, for judgment in favor of the defendant and against the plaintiff, adjudging that the order sustaining the demurrer to the complaint in the above entitled action, made by the District Court on the 16th day of August, A. D. 1917, is affirmed, and that the plaintiff's complaint herein is dismissed with prejudice, and that the defendant have and recover of the plaintiff its costs and disbursements in this Court and upon the appeal herein, to be taxed and allowed by the Clerk.

Dated July 20th, 1918.

MILLER, ZUGER & TILLOTSON,
Attorneys for Defendant.

Due and personal service by copy of the within Notice is hereby admitted 20 day of July, 1918, at Bismarck, North Dakota.

JOHN L. ERDALL,
NEWTON, DULLAM & YOUNG,
Attorneys for Plaintiff.

63 STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THE WASHBURN LIGNITE COAL COMPANY, Defendant.

Order for Judgment on Remittitur.

This Court having, on the 16th day of August, A. D. 1917, made its order in the above entitled action ordering that the defendant's demurrer to the plaintiff's complaint herein, wherein defendant demurred on the ground and for the reason that said complaint on its face fails to state facts sufficient to constitute a cause of action, be sustained, and the plaintiff having thereafter duly appealed to the Supreme Court of the State of North Dakota from said order sustaining the demurrer; and the Supreme Court having, on the 12th day of June, A. D. 1918, made its decision and order affirming the order of this Court appealed from as aforesaid, and further ordering that the defendant and respondent have and recover of plaintiff and appellant its costs and disbursements on appeal, to be taxed and allowed in this Court; and the Supreme Court having, on the 3rd day of July, A. D. 1918, transmitted its order and decision, as the remittitur herein, to this Court;

It Is Therefore Ordered, That the order sustaining the demurrer in the above entitled action, made by this Court on the 16th day of August, A. D. 1917, be affirmed.

It Is Further Ordered, That the defendant, the Washburn Lignite Coal Company, have judgment against the plaintiff, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, that the plaintiff's complaint herein be dismissed, with prejudice, and that defendant have its costs and disbursements in this Court and its costs and disbursements upon the appeal herein, the same to be taxed and allowed by the Clerk of this Court.

Let Judgment be entered accordingly.

64 Dated this 2nd day of August, A. D. 1918.

By the Court:

W. L. NUESSLE,
Judge.

65 STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THE WASHBURN LIGNITE COAL COMPANY, Defendant.

Judgment.

This Court having on the 16th day of August, A. D. 1917, made its order in the above entitled action ordering that the defendant's demurrer to the plaintiff's complaint herein, wherein defendant demurred on the ground and for the reason that said complaint on its face fails to state facts sufficient to constitute a cause of action, be sustained, and the plaintiff having thereafter duly appealed to the Supreme Court of the State of North Dakota from said order sustaining the demurrer; and the Supreme Court having, on the 12th day of June, A. D. 1918, made its decision and order affirming the order of this Court appealed from as aforesaid, and further ordering that the defendant and respondent have and recover of plaintiff and appellant its costs and disbursements on appeal, to be taxed and allowed in this Court; and the Supreme Court having, on the 3rd day of July, A. D. 1918, transmitted its order and decision, as the remittitur herein, to this Court;

This Court having accordingly made its order thereon on the 2nd day of August, A. D. 1918, for judgment in favor of the defendant and against the plaintiff;

It Is Now Adjudged, Considered and Determined, By the Court, that the order sustaining the demurrer in the above entitled action, made by this Court on the 16th day of August, A. D. 1917, be affirmed, and that the defendant, The Washburn Lignite Coal Com-

pany, have and recover of the plaintiff, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, its costs and disbursements in this Court, and its costs and disbursements
66 upon the appeal herein, taxed and allowed in the sum of $37.00; and that the plaintiff's complaint herein be dismissed *with* prejudice.

Witness the Honorable W. L. Nuessle, Judge of the District Court of Burleigh County, Sixth Judicial District, North Dakota, and my hand and the seal of said Court on this 2nd day of August, A. D. 1918.

[Seal of the District Court.]

CHAS. FISHER,
Clerk of said Court.

67 STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THE WASHBURN LIGNITE COAL COMPANY, Defendant.

Notice of Entry of Judgment.

To the above named plaintiff, and to John L. Erdall, Esq., and Messrs. Newton, Dullam & Young, their attorneys:

Please Take Notice, That judgment in this action was, on the 2nd day of August, A. D. 1918, duly entered in the office of the Clerk of this Court, in the County of Burleigh, State of North Dakota, wherein it is adjudged, considered and determined that the order sustaining the demurrer in the above entitled action, made by the District Court on the 16th day of August, A. D. 1917, is affirmed; and that the plaintiff's complaint herein is dismissed with prejudice; and that the defendant have and recover of the plaintiff its costs and disbursements in this Court and upon the appeal herein taxed and allowed in the sum of $37.00.

Dated this 2nd day of August, A. D. 1918.

MILLER, ZUGER & TILLOTSON,
Attorneys for Defendant.

Due and personal service by copy of the within Notice of Entry of Judgment, Notice of Retaxation of Costs and copy of Statement of Costs is hereby admitted 2nd day of August 1918, at Bismarck, North Dakota.

NEWTON, DULLAM & YOUNG,
Attorney- for Plaintiff, Bismarck, N. D.

68 STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

THE WASHBURN LIGNITE COAL COMPANY, Defendant.

Clerk's Certificate.

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

I, Chas. Fisher, Clerk of the District Court within and for the County of Burleigh, in the Sixth Judicial District of the State of North Dakota, Do Hereby Certify, That the foregoing and hereto attached are true, correct and complete copies of the Original Notice of Appeal, Waiver of Undertaking, Summons, Complaint, Stipulation, Demurrer to Complaint, Order Sustaining Demurrer, Judge's Certificate to Record on Appeal, Clerk's Certificate to Record on Appeal, Remittitur, Copy of Opinion, Notice of Application for Judgment, Order for Judgment on Remittitur, Judgment, and Notice of Entry of Judgment, in an action wherein the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a corporation, was Plaintiff, and the Washburn Lignite Coal Company, was Defendant, as the same now remain on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said District Court at my office in the Court House in the City of Bismarck, Burleigh County, North Dakota, this 15th day of August, A. D. 1918.

[Seal District Court, Sixth Judicial District, Burleigh County, North Dakota.]

CHAS. FISHER,
Clerk of the District Court, Burleigh County, North Dakota.

Endorsed on cover: File No. 26,745. North Dakota, Sixth Judicial District, District Court. Term No. 659. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, plaintiff in error, vs. Washburn Lignite Coal Company. Filed September 13th, 1918. File No. 26,745.

FILED
DEC 30 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

OCTOBER TERM 1919.

No. [redacted]55

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Plaintiff in Error,*

vs.

WASHBURN LIGNITE COAL COMPANY, *Defendant in Error.*

IN ERROR TO THE DISTRICT COURT, SIXTH JUDICIAL DISTRICT, STATE OF NORTH DAKOTA.

Brief of Plaintiff in Error.

JOHN L. ERDALL,
Attorney for Plaintiff.

A. H. BRIGHT AND H. B. DIKE,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM 1919.

No. 204

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,

vs.

WASHBURN LIGNITE COAL COMPANY,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT, SIXTH JUDICIAL DISTRICT, STATE OF NORTH DAKOTA.

Brief of Plaintiff in Error.

STATEMENT.

For convenience, plaintiff in error, who was plaintiff in the trial Court, will be referred to as the "plaintiff" and the defendant in error, who was defendant in the trial Court, will be referred to as "defendant."

The transcript of record will be referred to as "Transcript" (Tr.).

This action was brought by the plaintiff to recover from the defendant certain alleged undercharges for carrying coal from June 30, 1910 to June 1st, 1915, to-wit: the difference between

the statutory rates on coal provided in Chapter 51 of the Laws of North Dakota for the year 1907 (which latter rates plaintiff claims were confiscatory) and the rates alleged in the complaint. The defendant demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. The trial Court entered an order sustaining the demurrer. Plaintiff appealed to the Supreme Court of the State of North Dakota from the order. The latter court affirmed the order and duly remitted the case to the trial Court. Pursuant to the mandate of the State Supreme Court final judgment was entered in the trial Court affirming the order sustaining the demurrer and adjudging that the plaintiff's complaint be dismissed with prejudice.

Upon application of the plaintiff a writ of error was issued out of the Supreme Court of the United States to review the judgment of the State Court last referred to.

The complaint and demurrer are set out in full in the transcript pages 12, 13, 14, 15, 16 and 17. The third paragraph of the complaint (Tr. 13) reads as follows:

> "That at different times between the 30th day of June 1910 and the first day of June, 1915, plaintiff received and transported coal by the carload for and on account of the defendant between points in North Dakota; that the defendant by reason thereof, became obligated to pay to the plaintiff the lawful and reasonable rates for such transportation; that the defendant at the times said shipments moved, ever since and now does refuse to pay to the plaintiff such lawful and reasonable rates and has only paid the plaintiff therefor the rates prescribed by Chapter 51 of the laws of the State of North Dakota for the year 1907."

The complaint then avers, paragraphs 4, 5 and 6 (Tr. 13, 14, 15 and 16) that the plaintiff refused to comply with Chapter 51 and the Attorney General brought a suit to compel such compliance. The proceedings in the latter suit, namely, the suit *of State ex rel T. F. McCue v. Northern Pacific Railway Company, et al*, are pleaded with particularity, including the final

decree entered in the latter suit on the 11th day of June 1915 pursuant to the mandate of the United States Supreme Court, by the terms of which the judgment of the State Court declaring said statute valid was reversed and set aside and the action dismissed.

It is further alleged that the action last referred to was brought in the name of the State of North Dakota and on behalf of all of the people, citizens and residents of that state; that the final decision and mandate of the Supreme Court of the United States, reported in volume 236 of the United States Supreme Court Reports, beginning on page 585, declaring Chapter 51 to be unconstitutional and invalid and the final decree entered by the Supreme Court of the State of North Dakota on said 11th day of June 1915 pursuant to said Mandate of the United States Supreme Court, is binding upon the defendant and all other citizens and residents of the State of North Dakota.

Paragraph 7 of the complaint (Tr. 16) then provides:

> "That the plaintiff at the time said shipments moved, and until the 11th day of June 1915 by reason of the mandate of the Supreme Court of the United States and the decree entered in the Supreme Court of the State in the year 1910 aforesaid, without its consent and against its will, was coerced and forced to accept and transport for the defendant, all of said shipments upon payment to the plaintiff of the rates and charges prescribed in said Chapter 51, and that from and after the 11th day of June 1915 when final judgment was entered in the Supreme Court of the State in said State case as aforesaid, plaintiff became entitled to recover from the defendant the difference between said lawful and reasonable rates and the rates prescribed by said Chapter 51 heretofore paid by the defendant amounting in all to the sum of $26,819.99."

The purpose of the latter paragraph was to allege that plaintiff did not voluntarily transport the coal for the statutory rate but because it was coerced and forced to do so by the injunctional decree; that until such decree was vacated and the State

case dismissed the right of the plaintiff to bring this suit was suspended and to specify the sum to which plaintiff claimed it was entitled.

Paragraph 8 of the complaint then pleads a demand upon the defendant for the sum named and the refusal of the defendant to pay the same or any part thereof, and contains a prayer for judgment.

Both parties to this litigation desire to have the question, whether or not the plaintiff can recover from the defendant these alleged undercharges, decided upon its merits. It has been from the beginning and i s now expressly understood between the attorneys for the respective parties, that no technical or amendable defect in the complaint shall be taken into consideration.

The plaintiff, quite frequently in this brief, will refer to the case of *State ex rel T. F. McCue v. Northern Pacific Railway Company, et al.* For brevity it will be designated as the "North Dakota" case.

,Plaintiff will also refer to the case of *Missouri v. Chicago, Burlington & Quincy Railroad Company*, 241 U. S. 533. For brevity the latter case will be designated as the "Burlington" case.

The other case, to be argued with this case, namely, *Minneapolis, St. Paul & Sault Ste. Marie Railway Company, plaintiff in error v. C. L. Merrick Company, defendant in error*, will be referred to as the "Merrick" case, and this case, namely, *Minneapolis, St. Paul & Sault Ste. Marie Railway Company, plaintiff in error v. Washburn Lignite Coal Company, defendant in error*, will be referred to as the "Washburn" case.

ASSIGNMENTS OF ERROR.

I. The Supreme Court of North Dakota erred in affirming the order of the trial court sustaining the demurrer to the complaint herein on the ground that said complaint on its face fails to state facts sufficient to constitute a cause of action.

II. The state court erred in entering final judgment in this proceeding in favor of the defendant in error and against the plaintiff in error.

III. The state court erred in refusing to hold that the rates on coal prescribed by Chapter 51 (Laws of North Dakota, 1907), as applied to the shipments involved in this litigation were confiscatory and therefore repugnant to Section 1, Article 14 of the Amendments to the Federal Constitution.

IV. The state court erred in deciding and adjudging that plaintiff in error could only collect from defendant in error for the coal shipments involved in this litigation, the rates prescribed by said Chapter 51; that such decision and adjudication of the state court amounts to depriving the plaintiff in error of its property without due process of law and denying to plaintiff in error the equal protection of the law, in violation of said Section 1, Article 14 of said Amendments.

V. The state court erred in deciding and adjudging that plaintiff in error was not entitled to recover from defendant in error the difference between the reasonable rate alleged in the complaint and the rate prescribed by said Chapter 51; that such decision of the state court deprives plaintiff in error of its property without due provess of law, and denies to plaintiff in error the equal protection of the law, in violation of said Section 1, Article 14, of said Amendments.

VI. The state court erred in refusing to give proper and due effect to the first decree entered in March 1910, pursuant

to the mandate of the United States Supreme Court in the case of *State of North Dakota, ex rel., v. Northern Pacific Railway Company et al.*, in deciding and adjudging that said first decree operated in the future and fixed the rate prescribed by said Chapter 51 as the lawful rate in force and effect until the entry of the second decree in said state case in June, 1915.

VII. The state court erred in deciding and adjudging that the first decree in the state case operated in the future and made the rate prescribed by said Chapter 51 the lawful rate until the entry of the second decree in the state case. That such decision deprives the plaintiff in error of its property, without due process of law, and denies to the plaintiff in error the equal protection of the law, in violation of Section 1, Article 14, of said Amendments.

VIII. The state court erred in deciding and adjudging that because the courts, at the time of the first decree in the state case, did not impose any terms, or require any bond or undertaking, the plaintiff in error was without remedy, although the rate which the plaintiff in error was compelled to accept was confiscatory and unconstitutional. That such decision and adjudication of the state court in the present case amounts to taking the property of plaintiff in error without due process of law, and denies to plaintiff in error the equal protection of the law, in violation of said Section 1, Article 14, of said Amendments.

IX. The state court erred in refusing to give proper and due effect to the first decree entered in said state case, in deciding and adjudging that because the courts at the time of the first decree in the state case, did not impose any terms, or require any bond or undertaking, plaintiff in error was without remedy, although the rate prescribed by said Chapter 51, which plaintiff in error was compelled to accept, was confiscatory and unconstitutional. That such decision and adjudica-

tion of the state court in the present case amounts to taking the property of plaintiff in error without due process of law, and denies to plaintiff in error the equal protection of the law, in violation of said Section 1, Article 14 of said Amendments.

X. The state court erred in refusing to give proper and due effect to the second decree entered in the state case in deciding and adjudging that said second decree did not adjuge the rates prescribed in said Chapter 51, as applied to the shipments involved in this litigation, confiscatory and unconstitutional. In other words, that said second decree operated wholly in the future and did not affect the past shipments of defendant in error, or past charges alleged to be due plaintiff in error, involved in the present litigation.

XI. The state court erred in deciding and adjudging that the second decree in the state case did not affect the rights of the plaintiff in error in respect to the past shipments involved in this litigation; that such rights were governed entirely by said Chapter 51 and the first decree in the state case; that such decision of the state court in the present case deprives plaintiff in error of its property without due process of law, and denies to plaintiff in error the equal protection of the law, in violation of said Section 1, Article 14, of said Amendments.

XII. The state court did not give proper and due effect to the second decree entered in the state case in refusing to hold that defendant in error was bound by the latter decree; that therefore the rates which plaintiff in error had been compelled to accept in connection with the shipments involved in this litigation, by virtue of said Chapter 51, were confiscatory and unconstitutional.

XIII. The state court erred in deciding and adjudging that the sole scope of Section 1, Article 14, of said Amendments was to permit state action in violation of it to be set aside; that

although the plaintiff in error had been compelled to carry coal for the defendant in error in violation of the Amendment, such violation does not furnish any basis for a cause of action in favor of the plaintiff in error and against defendant in error.

ARGUMENT.

POINT I.

The defendant in this case was a citizen and resident of the state of North Dakota when the North Dakota case was litigated. The latter case was brought on behalf of all of the citizens of North Dakota, and all citizens of that state are bound by the final judgment entered therein.

There is really no controversy in respect to this proposition. In support of it we refer the court to what is said on page 8 and the authorities referred to on page 9 of the brief filed herein in the *Merrick case.*

POINT II.

Chapter 51, as applied to the plaintiff and defendant during the period involved in this particular controversy (namely from June, 1910, to June, 1915), was unconstitutional and of no effect.

Immediately after the first decision of the United States Supreme Court in the North Dakota case and the decree entered pursuant thereto in the state court in March, 1910, the plaintiff put in force the rates prescribed by said Chapter 51 and thereafter until June, 1915, charged and collected only the rates prescribed by said Chapter 51. In July, 1911, after having made an adequate trial of the rates prescribed by said Chapter 51, the plaintiff having satisfied itself that such rates were confiscatory and that the confiscatory character of said

rates could be established by the testimony which the plaintiff could offer, based upon the actual trial of said rates between June 30, 1910, and June 30, 1911, duly applied to the Supreme Court of the state of North Dakota, for leave to reopen the North Dakota case, and an order was thereupon duly entered reopening said case and appointing a referee for the taking of additional testimony therein. Additional testimony was taken by said referee which covered all receipts for the year preceding June 30, 1911, together with proof of expenses chargeable against the coal traffic, and thereafter a retrial was duly had in the Supreme Court of North Dakota, and the latter court thereafter duly made its separate findings of fact and conclusions of law and entered judgment therein declaring said Chapter 51 valid and commanding plaintiff and other carriers to keep the rates prescribed by said Chapter 51 in force (26 N. D. 438). That thereafter this plaintiff procured from the Supreme Court of the United States a writ of error to review the judgment entered by said Supreme Court; that subsequently after a full and due presentation of the matter the Supreme Court of the United States duly rendered its decision and made its mandate, which decision and mandate is reported in Volume 236, *United States Supreme Court Reports*, beginning page 585.

Quoting certain of the findings of fact made by the state court the Supreme Court of the United States referring to this plaintiff said in 236 U. S. 585, page 592:

> "Its total receipts amount to more than its actual out-of-pocket costs, or actual costs of transportation, but are from $9,000 to $12,000 less than the total costs including fixed and overhead expenses properly chargeable to the carriage of this commodity and against the earnings therefrom. That the carriage of lignite coal by the Soo Line within this state during said fiscal year was not only non-profitable but occasioned a loss to it when its fixed expenses apportionable to all traffic are in proportion and amount assigned to and charged against the earnings from this commodity."

On the same page the court said:

> "We understand that all the fixed charges to which the findings, refer, are actual expenses which, while including taxes, do not include any return whatever upon the investment in the property whether by way of interest or otherwise. The facts thus found must be taken to be established."

And the Court held:

> "As the maximum intrastate rates on coal in carload lots fixed by Chapter 51 of the Laws of North Dakota, are unreasonable—either requiring the carrier to transport the commodity at a loss or for a merely nominal compensation after taking into account the entire traffic to which the rates applied—the state exceeded its authority in enacting the statute which amounts to an attempt to take the property of the carrier without due process of law, in violation of the 14th Amendment." (See Syllabus, page 586).

Thereafter, to-wit, on the 11th day of June, 1915, pursuant to the mandate of the Supreme Court of the United States a final judgment was duly entered in the Supreme Court of the State in the North Dakota case reversing and setting aside the judgment of the State Court which held Chapter 51 valid and dismissing the action of the Attorney General brought to enforce that statute (Tr., 14 and 15).

The validity of Chapter 51, so far as the present case is concerned, depends upon the construction and effect to be given to the second decision of the United States Supreme Court in the North Dakota case, and the decree entered pursuant thereto. The latter decision and decree must be construed and given effect in accordance with the rule laid down in the *Burlington case.* In the latter case on page 539, the court said:

> "In a rate case where an assertion of confiscation was not upheld because of the weakness of the facts supporting it, the practice came to be that the decree rejecting the claim and giving effect to the statute was, where it was deemed the situation justified it, qualified as 'with-

> out prejudice,' not to leave open the controversy as to the period with which the decree dealt and which it concluded, but in order not to prejudice rights of property in the future, if from future operation and changed conditions arising in such future it resulted that there was confiscation. And the same limitation arising from a solicitude not to unduly restrain in the future the operation of the law came to be applied where the asserted confiscation was held to be established. In other words, the decree enjoining the enforcement of the statute in that case was also qualified as without prejudice to the enforcement of the statute in the future if a change in conditions arose."

Under the rule here laid down it appears to be so plain as to require no argument, that the judgment entered in the North Dakota case in June, 1915, conclusively decided that Chapter 51, as applied to this plaintiff during the test period, namely, from June, 1910, until June, 1911, was confiscatory and unconstitutional.

Moreover the rule laid down in the Burlington case not only makes the rate statute invalid and unconstitutional during the test period, but also invalid and unconstitutional up to and including the date of the final decree in the North Dakota case, namely June, 1915.

On page 541, the Court said, in the *Burlington case*:

> "Again it is said, conceding that the limitation without prejudice when applied to a rate case under the authorities has the significance which we have affixed to it, that meaning should only prevent the re-opening of the inquiry as to the period embraced by the testimony in the case and therefore should not be extended so as to prevent the re-opening from the time at least of the close of the testimony. This, it is said, must be the case since there might well be a change in conditions between the time when the proof in a case was taken and the entry of the final decree. But this contention again disregards the doctrine upon which, as we have pointed out, the reservation in rate-making cases came to be applied. In other words, it treats the reservation without prejudice as looking backward and overthrowing that which was concluded by the decree instead of considering it in its future light, that is, as look-

ing forward to the future and providing for conditions which might then arise."

In the *Burlington case* the decree under consideration was held to apply not only to the period covered by the testimony but also to the period from the taking of the testimony until the decree was entered.

We maintain therefore, that the final decree entered in the North Dakota case, June 15, 1915, conclusively decides that the statutory rate was confiscatory as applied to this plaintiff and this defendant during the entire period from June, 1910, until June, 1915.

It is contended, however, that the statutory rate was in force from March, 1910, until June, 1915, by virtue of the decree entered in March, 1910, pursuant to the first decision of the United States Supreme Court in the North Dakota case; That until the second decree was entered in the North Dakota case in June, 1915, the statutory rate was the lawful rate and consequently that the plaintiff cannot recover anything in excess of such rate.

But the Supreme Court of the United States expressly decided in the *Burlington case* that a decree in a rate case is not binding as to the future. Assuming that the decree entered in March, 1910, pursuant to the first decision of the United States Supreme Court in the North Dakota case was a final decree (which we deny for the reasons given in the Merrick brief), nevertheless under the rule laid down in the *Burlington case*, either party to the litigation might in the future apply for a change in such decree. Such proceedings were begun and by reason thereof, Chapter 51 was held invalid by the second decision of the United States Supreme Court in the North Dakota case and a decree entered to that effect, in June, 1915. Now, what is the result if the position taken by counsel in the *Merrick case* and in the *Washburn case* is correct? Simply

this: The decree entered in the North Dakota case in 1910, pursuant to the first decision of the United States Supreme Court, is binding not only as to the past but as to the period between 1910 and 1915; and the decree entered in the North Dakota case in 1915, pursuant to the second decision, will have no effect upon the rate to be charged between June 30, 1910, and June, 1915; It will therefore not have any effect upon the rate to be charged during the very period specifically covered by the test evidence, *namely*, from June 30, 1910, to June 30, 1911. In other words the decree entered in 1915, *does not relate to the past at all.*

What other result will follow if the contention of counsel is correct? Under the rule laid down in the *Burlington case* the decree entered in the North Dakota case in 1915, is not binding or conclusive as to the future. The practical result, therefore, will be that the decree entered in 1915, is not binding or conclusive as to the past, present or future. In short, that it has no practical or binding effect whatever.

The position of counsel is manifestly unsound, and would certainly lead to results not only unjust but absurd.

On the contrary it seems to us to be indisputable that the rule in the *Burlington case* should be applied to the decree entered in the North Dakota case in 1915, and that pursuant to such rule the effect of the latter decree must be that as applied to this plaintiff and defendant the rate prescribed by Chapter 51, was unlawful and confiscatory during the entire period from June, 1910, until June, 1915.

It is contended further that the statutory rate was in force from March, 1910, until June, 1915, by virtue of the injunction entered pursuant to the first decision of the United States Supreme Court in the North Dakota case; that if any loss or damage resulted to the plaintiff it arose from the act of the court for which there is no redress.

Point III.

The carrier did not charge and collect the statutory rate during the period in controversy voluntarily. It was coerced to do so by the injunctional decree of the court. That decree simply suspended the right of the carrier to collect the proper rate. When it was set aside the carrier then became entitled to recover what was due it, not as damages by reason of the injunction but upon the principle of equity that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby.

That the action of the carrier in charging and collecting the statutory rate was involuntary is very fully and clearly stated in the opinion of Justice Christianson of the Supreme Court of North Dakota (Tr., 32).

> "It is undisputed that the plaintiff consistently and vigorously asserted that the statutory rate was confiscatory. It refused to put the rate into effect and resisted the efforts of the state authorities to do so as long as possible. It put the rate into effect only when it had been commanded by the decree of this court, and of the Supreme Court of the United States to do so. Such decree was entered in an action brought on behalf of the State of North Dakota by its Attorney General and such decree necessarily enured to the benefit of the shippers or consumers of lignite coal. A final decree in such action would doubtless be *res judicata* upon the Railroad Company on the one hand and those represented by the Attorney General, that is, the State and its people, on the other hand. The only logical and reasonable deduction that can be drawn from the undisputed facts in this case are that the plaintiff did not put the statutory rate into operation, or voluntarily transport coal at the statutory rate, but did so involuntarily and solely because it could no longer refuse to do so without violating the decree of this court and thereby subjecting itself to penalty. It seems clear to me that under such circumstances it cannot be said that the actions of the carrier in accepting and transporting shipments

of coal were voluntary, or the contract of carriage freely and voluntarily made. In order that there may be a valid contract the parties must consent thereto and the consent must be free and mutual. The plaintiff had no option. It could not refuse to accept shipments of coal, but 'it must, if able to do so accept and carry' the coal, offered to it for transportation, and transport the same over its lines. Section 5673, R. C. 1905 (Sec. 6236, C. L. 1913). It was compelled by the Act of the Legislature and the Judicial Decree to accept and carry intrastate shipments of lignite coal at a confiscatory rate, and it was forbidden under penalty to charge a compensatory rate for performing such service. * * * The inevitable result was that by virtue of the Legislative Enactment and the Judicial Decree the plaintiff's property was taken away and handed over to others without compensation, in violation of constitutional guaranty. This is indisputably established by, or necessarily inferred from, the facts alleged in the complaint."

In the late case of *Arkadelphia Co. v. St. Louis Ry. Co.*, 249 U. S. 134, the court had under consideration, among other questions, the right of a shipper to collect from a carrier the excess rate either under a bond given by the carrier in cetain injunction proceedings, or to do so independently of such bond. On page 145, the court said:

"As to that portion of the claims which accrued after the final decrees, this, as we already have held in the *McKnight case*, 244 U. S. 368, 374, was not recoverable upon the injunction bonds, nor against the sureties therein. On a fair construction of the conditions of those instruments, their obligation expired by limitation when the suits were brought to a final conclusion. Hence, to the extent that the supplemental decree now under review awards a recovery against the sureties for claims accruing after the final decrees, it must be modified.

But, in our opinion, this portion of the claims is allowable against the railway companies themselves upon the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary, to that which he

has lost thereby. This right, so well founded in equity, has been recognised in the practice of the courts of common law from an early period. Where plaintiff had judgment and execution and defendant afterwards sued out a writ of error, it was regularly a part of a judgment of reversal that the plaintiff in error 'be restored to all things which he hath lost by occasion of the said judgment;" and thereupon, in a plain case, a writ of restitution issued at once; but if a question of fact was in doubt, a writ of *scire facias* was first issued."

Among the authorities cited by the Court in the latter case is the earlier case *United States Bank v. Bank of Washington*, 31 U. S. 8 (6 Peter, 817), page 16 (Star page 17), the court said:

"On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost; and the mode of proceeding to effect this object must be regulated according to the circumstances. Sometimes, it is done by a writ of restitution, without a *scire facias;* when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases, a *scire facias* may be necessary to ascertain what is to be restored. 2 *Salk.* 587-8; *Tidd's Pract.*, 936, 1137-8. And, no doubt, circumstances may exist where an action may be sustained to recover back the money." 6 *Cowen*, 297.

In *Bellamy v. St. L. I. M. & S. Ry. Co.*, 220 Fed. 876, an attempt was made to hold Bellamy in the Federal District Court and to prohibit him from suing in the state court. A bond had been given by the carrier to protect shippers and passengers. The court held that Bellamy could sue in the state court to recover excess charges and that the injunction did not destroy his right to bring an independent action. The Court said on page 878:

"The order is too broad. The court had jurisdiction of all liabilities arising out of the bonds made pursuant to its orders. It could appoint a master, before whom all claims

based on those bonds should be heard, and restrain actions in other jurisdictions to collect such claims. The bonds were judicial. The orders requiring them to be given retained the jurisdiction of the court to ascertain and enforce liabilities arising under them. That power probably existed independently of such reservation. * * * This, however, was the measure of the court's jurisdiction. Parties from whom excessive rates had been exacted were not confined to suing on the bonds. They also had the right given them by law to recover the overcharges. That right was not destroyed by the injunction, but was simply suspended. As soon as the injunction was out of the way, the right of remedy for its enforcement stood the same as if the injunction had never been issued.

See also *Hackler v. Myers*, 132 N. Y. 363.
Pulteney v. Warren, 6 Ves. 73.
Southern Railway Co. v. Railroad Commission of Alabama, 196 Fed. Rep. 558.
Tift v. Railroad Co., 123 Fed. 789, and the same case, 138 Fed. 753.
Love v. North American Co., 229 Fed. 103, 106.

Concluding what we have to say under this point: We wish to emphasize the fact that we are not seeking to recover damages flowing from or connected with the injunction entered in 1910, in the North Dakota case, but to recover undercharges to which we are entitled by law independent of the injunction and which we were restrained from recovering temporarily by the injunction.

IV.

The plaintiff is entitled to recover the difference between the reasonable rate pleaded in the complaint and the rate prescribed by Chapter 51.

In *Northern Pacific Railway Company v. North Dakota*, 236 U. S. 585, on page 595, the court said, referring to the plaintiff and other carriers:

> "As a carrier for hire, it cannot be required to carry persons or goods gratuitously."

And again on pages 598 and 599:

> "The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges. * * * But a different question arises when the state has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted."

Again on page 603 the Court said:

> "Whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate."

In *Reagan v. Farmers Loan and Trust Company*, 154 U. S. 362, on page 397, the Court said:

> "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet, it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates."

The complaint in this case alleges that at different times between the 30th day of June, 1910, and the first day of June, 1915, plaintiff received and transported coal by the car-load for and on account of the defendant betwen points in North Dakota; that the defendant, by reason thereof, became obligated to pay to the plaintiff the lawful and reasonable rates

for such transportation; that the defendant, at the times said shipments moved, ever since has and now does refuse to pay to the plaintiff such lawful and reasonable rates and has only paid the plaintiff therefor the rates prescribed by Chapter 51 of the Laws of the state of North Dakota, for the year 1907.

The complaint further alleges that the difference between said lawful and reasonable rates and the rates prescribed by said Chapter 51 is the sum of $26,819.99, and judgment is demanded for that amount.

The defendant having demurred to the complaint and the trial court having sustained such demurrer on the ground that the complaint fails to state a cause of action the allegations of fact just referred to must be presumed to be true for the purpose of this argument. It therefore follows that the plaintiff is entitled to recover from the defendant a reasonable and compensatory rate on the shipments handled for the defendant during the period in question, which it is alleged amount to $26,819.99 more than the rate previously collected.

We do not see how the question of what disposition the defendant made of the coal, or what price the defendant charged for the coal, if it sold it to others, can make any difference in the decision of this case. In law, as we have already seen, the defendant was a party to the proceedings in the North Dakota case; and is bound by the decree entered in that case. Our right to recover, in view of the allegations of the complaint, is against the defendant. This also follows from the rule laid down by this court in the recent case of *Southern Pacific Company v. Darnell-Tannzer Co.*, 245 U. S. 531.

V.

Section 142 of the constitution of North Dakota cannot be given the effect claimed by counsel for the defendant since to do so would be repugnant to and would violate the fourteenth Amendment to the Constitution of the United States.

In the State Court counsel for defendant argued that the statutory rate was lawful and in force from March, 1910, until June, 1915, by virtue of Section 143 of the Constitution of North Dakota. If such argument is made in this court we respectfully refer the court to our argument under point five (V) of the brief in the *Merrick case.*

In conclusion we submit that the complaint in this case does state a cause of action; that the judgment entered in the State Court directing that the complaint be dismissed with prejudice should be reversed and set aside, and further proceedings had according to law.

Respectfully submitted,

JOHN L. ERDALL,
Attorney for Plaintiff.

A. H. BRIGHT AND H. B. DIKE,
Of Counsel.

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No. 204.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1919.

MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

WASHBURN LIGNITE COAL COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT, SIXTH JUDICIAL DISTRICT, STATE OF NORTH DAKOTA.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

The history of this litigation may be epitomized as follows: In 1907, the legislative assembly of North Dakota enacted a law providing for maximum freight rates per ton for hauling coal in carload lots within said state. This statute is Chapter 51, Laws of North Dakota for 1907, and became effective July 1st, 1907.

Plaintiff and other railroads refused to comply with the law, whereupon a suit was brought by the State on relation

of the attorney general to enjoin such continued violation. The state court, on April 16th, 1909, held the law valid and gave judgment against the carriers as prayed for.

State of North Dakota, ex rel. McCue v. *Northern Pacific Railway Company*, 19 N. D. 45, (57).

Thereupon the suit was taken to this Court on writ of error to the state court. The plaintiff herein filed a bond as directed by this Court, and obtained a stay of execution of the decree of the state court, pending the decision of this Court.

On March 14th, 1910, this Court affirmed the decree of the state court, "but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

Northern Pacific Railway Company v. *State ex rel. McCue*, 216 U. S. 579.

The statutory rate was not put into operation until after the decision of this Court at 216 U. S. 579. Thereupon plaintiff put it into effect.

On July 1st, 1911, after employing the statutory rate for more than one year, plaintiff secured leave from the state court to reopen the case on the allegation, that after adequate trial following the decision at 216 U. S. 579, it was ready to establish the confiscatory character of the rates provided in said Chapter 51. By agreement the same pleadings were used. Testimony was taken covering the period between June 30th, 1910, and June 30th, 1911.

On January 2nd, 1914, the state court rendered its decision and awarded the state the same relief as it did in 19 N. D. 45, its findings of fact covering the period embraced in the last investigation.

State ex rel. McCue v. *N. P. Ry. Co.*, 26 N. D. 438.

Thereafter the plaintiff secured a writ of error from this Court to the state court, to review the last decision in 26 N. D. 438, but no stay was asked or obtained of the state court's judgment. The plaintiff continued to apply the statutory rate pending the decision of this Court.

On March 8th, 1915, this Court reversed the second decree of the state court, in 26 N. D. 438. This reversal in no way affected but left intact, the first decree of the state court, in 19 N. D. 45, and the decision of this Court affirming it, in 216 U. S. 579.

Northern Pacific Railway Company v. *State ex rel. McCue*, 236 U. S. 585.

Then, on June 11, 1915, on mandate from this Court, the state court entered its judgment in conformity with the decision, last above mentioned, of this Court, *nunc pro tunc* as of June 5th, 1915.

THE ISSUE.

The issue herein rises upon the general demurrer to the complaint, which was sustained by the state courts (Transcript, pp. 17, 18). The coal, for the transportation of which the plaintiff claims to recover undercharges, was all hauled between June 30th, 1910, and June 1st, 1915 (Paragraph III, Complaint, Transcript, p. 13).

The theory of plaintiff's case appears in paragraph VII of the complaint, and its cause of action is there stated as follows:

> "That the plaintiff at the time said shipments moved, and until the 11th day of June, 1915, by reason of the mandate of the Supreme Court of the United States and the decree entered in the Supreme Court of the state in the year 1910, aforesaid, without its consent and against its will, was coerced and forced to accept and transport for the defendant, all of said shipments upon payment

to the plaintiff of the rates and charges prescribed in said Chapter 51. That from and after the 11th day of June, 1915, when final judgment was entered in the Supreme Court of the state in said state case as aforesaid, plaintiff became entitled to recover from the defendant the difference between said lawful and reasonable rates and the rates prescribed by said Chapter 51 heretofore paid by the defendant amounting in all to the sum of $26,819.99 Dollars" (Transcript, p. 16).

The plaintiff further claims that Sec. 142 of the Constitution of North Dakota, reading:

> "Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and all railroads, sleeping cars, telegraph, telephone and transportation companies of passengers, intelligence and freight are declared to be common carriers and subject to legislative control; and the legislative assembly shall have power to enact laws regulating and controlling the rates of charges for the transportation of passengers, intelligence and freight, as such common carriers, from one point to another in this state; provided, that appeal may be had to the courts of this state from the rates so fixed; but the rates fixed by the legislative assembly or board of railroad commissioners shall remain in force pending the decision of the courts,"

if applied to this case, violates the Fourteenth Amendment to the Federal Constitution (Paragraph VI, Complaint, Transcript, pp. 15, 16).

ARGUMENT.

I.

It must be conceded (1) that if plaintiff voluntarily, in law, performed the service for the compensation accepted, it cannot recover; and (2) if the compensation received was according to the legal rate then prevailing for such service it cannot recover.

Plaintiff claims it was coerced and forced to transport shipments for the defendant at the rates prescribed by said

Chapter 51 by reason of the decree of the United States Supreme Court and its mandate thereon (216 U. S. 579). It is not alleged that plaintiff performed the services under protest or any compulsion, except such as was imposed by the act of the court. An act performed in obedience to a lawful mandate of a court of competent jurisdiction can never be construed as having been performed under coercion or force. The complaint ignores the effect and purpose of the decree of this Court in 216 U. S. 579. That decree was in no sense interlocutory. It was final; it settled the right of the state to the injunction; it awarded the relief sought. No terms or conditions were imposed. The mandatory injunction was absolute. By it the plaintiff was commanded to apply the statutory rate and keep it in force until the further order of the Court. All transactions occurring thereafter and up to its revocation were governed thereby; it measured, while it was in force and unrevoked, the rates to be charged.

There is no question here as to reasonable or confiscatory rates; the legal rate was pointed out by the Court and that rate the plaintiff was commanded to obey. There could not here exist in law two rates for the same period of time, one legal by the court's judgment, and another supposed by the plaintiff to be compensatory. In other words, it matters not whether the rate put into effect by the Court was in fact compensatory and reasonable or non-compensatory and unreasonable.

The subsequent decree of this Court (236 U. S. 585) does not vacate or qualify the first decree in 216 U. S. 579. The decree in 236 U. S. 579 reverses the state court's decree in 26 N. D. 438, and annuls the statutory rate for the future only, from the date the last decree of this Court became operative. It must be borne in mind that plaintiff neither applied for nor gave a bond to stay the effect of the second judgment of the state court in 26 N. D. 438, but it kept the statutory rate in force as to all shippers of coal. It told the world by its

printed schedules that the statutory rate was its rate for the transportation of coal. Such schedules were at all times open to public inspection.

Sections 4339, 4342, N. D. Rev. Code, 1905; 4724, 4727, Compiled Laws of North Dakota, 1913.

Shippers had no notice of any other rate.

Under such circumstances will the law imply a contract, or impose an obligation on the shipper to pay a higher and different rate? This cannot be. The elements essential to the implication of such obligation are lacking. By whose fault was the plaintiff deprived of what it now claims was adequate compensation? The plaintiff cannot lawfully claim to be compensated by this defendant on any equitable principle. It does not appear that defendant, a mine operator and distributor of coal, has been enriched at the expense of the plaintiff. Whatever freight rate defendant paid was added to the price of the coal. The low rate benefited the consumers of the coal without a doubt.

Plaintiff had within its reach the means to protect itself by applying for, and no doubt securing, a stay pending the last resort to this Court. The defendant had no means of protection. It could lawfully add to the price of the coal no more for freight than the money it paid for hauling the coal. If defendant is made to pay the difference between the statutory rate and such higher rate as plaintiff now claims, the defendant will have no redress. To allow this would be to visit the consequences of plaintiff's mistake and the Court's action upon the one without fault in the matter.

II.

The damage, if any, which plaintiff has suffered is *damnum absque injuria*. Its loss is attributable to its own failure or inability to prove the confiscatory nature of the statutory rate in the first action. It cannot base its right to recover on the doctrine of mistake of fact, for it always professed to

know that the statutory rate was confiscatory. It took its own time to experiment and ascertain how to prove this and it would be manifestly inequitable and unjust to shift the burden of the experiment to the defendant. In such cases the courts leave the loss where they find it.

Winbiel v. *Carroll*, 16 Hun. 101.

By virtue of Section 142 of the Constitution of North Dakota, and under the doctrine established by the decisions of this Court, we believe, statutes fixing rates to be charged by carriers for the transportation of passengers and freight are *prima facie* valid. The same rates may be upheld as to one carrier and held invalid and confiscatory as to another. The statutory rates are never void *ab initio;* they are lawful until declared unlawful by the courts; and until so declared, measure the compensation to be received by the carrier.

The usual method employed by carriers who think rates confiscatory is to apply to a court of competent jurisdiction for an injunction against the enforcement of the rates by giving a bond to protect shippers in the event the rates are finally upheld. Where no bond has been given and no stay secured the damages resulting from the Court's decree are within the rule of *damnum absque injuria.*

Russell v. *Farley*, 15 Otto 433.

Neither of the decrees in the state case (216 U. S. 579 and 236 U. S. 585) made any provision as to adjustment of differences between the carriers and shippers.

The case of *Missouri* v. *Chicago, Burlington & Quincy Ry. Co.*, 241 U. S. 533, is not authority for plaintiff's claim that it is entitled to recover undercharges for the period here in question. That case explained quite clearly the meaning of a decree "without prejudice" such as the first one in 216 U. S. 579. It did not, however, decide whether or not excess rates paid the carrier pending a decision as to the constitutionality of a rate fixing statute might ultimately be recovered in the

absence of a condition to that effect imposed when the injunction was issued. So, it is no authority here for the claim, that when this Court held our statute confiscatory in 236 U. S. 585, the plaintiff became entitled to recover the difference between the statutory rate and an alleged reasonable rate. In the Burlington case, this Court said:

> "Additionally, we have not considered, and express no opinion upon, the arguments dealing with the question of the ultimate right to recover in the absence of a condition to that effect imposed when the injunction was issued, in view of the terms of the injunction obtained * * *."

Neither does the case of *Arkadelphia Company* v. *St. Louis Railway Co.*, 249 U. S. 134, support plaintiff's theory of recovery. There the Court passed on the right of a shipper to collect from a carrier the excess rate under a bond given by the carrier in certain injunction proceedings, and the right to recover against the carrier for excess rates exacted after final decree holding the rates excessive. The Court held that the portion of the claims which accrued after the final decrees was not recoverable upon the injunction bonds, or against the sureties thereon. The Court held the carrier only liable to refund the excess rates exacted after the final decrees. The case arose in the United States District Court, and reached this Court on appeal. The decision might be authority for plaintiff if it were attempting to recover for under-charges accruing after judgment on the mandate in the last decision of this Court, in 236 U. S. 585. It was an equitable proceeding throughout; bonds were given by the carrier; injunctions granted staying the operation of the rates pending final decrees; and it is authority for what we contend plaintiff's practice herein might have been to protect itself, and not for its recovery in the situation presented by the case at bar.

This case is, however, very strong authority for recovery by the shipper (The C. L. Merrick Company) in the case, now pending before this Court, of *Minneapolis, St. Paul &*

Sault Ste. Marie Ry. Co., Plaintiff in Error, v. *The C. L. Merrick Company, Defendant in Error.* So is the McKnight case, in 244 U. S. 368, cited in the Arkadelphia case. These cases also illustrate the practice which enables carriers to protect themselves against contingencies by giving bond and securing injunction against rates thought to be confiscatory.

The injunction awarded in 216 U. S. 579 was a continuing remedy; it fixed the statutory rate as the one to be collected until such time as it might be modified or dissolved by a new judgment or decree; during the time involved in this suit it was the only measure of the rights and obligations of these parties.

Knoxville v. *Water Company,* 212 U. S. 1;
Wilcox v. *Consolidated Gas Company,* 212 U. S. 19;
Louisville v. *Cumberland Telegraph & Telephone Co.,* 225 U. S. 430;
Des Moines Gas Co. v. *Des Moines,* 238 U. S. 153;
Missouri Rate Cases, 230 U. S. 474.

It seems plain from the decisions of this Court, that its qualified decrees, such as 216 U. S. 579, are intended to be absolutely binding as an adjudication of the rights of the parties down to the time of their entry. It is also reasonably plain that they are to continue in force until modified or reversed. In this case the plaintiff has simply rendered the service at the rate fixed by the legislature which was upheld by the Court. As said by the Supreme Court of North Dakota:

> "As to the future, therefore, adopting the construction of the decree most favorable to the plaintiff in this suit, it has simply rendered the service at a rate which both the legislature and the judiciary have determined to be applicable, and it has rendered the service without any other contract on the part of the shipper than would arise from the mere delivery of his goods for transportation according to the prescribed rates. The prescribed rates are either applicable or they are not applicable at the time the goods are delivered for shipment. The

legislature and the Supreme Court of the United States have considered that they are applicable, and during the period embraced in this controversy it is inconceivable that either the shipper or the carrier should have been allowed to question it, except in the manner allowed by the Supreme Court. When that court finally dissolved the injunction, it did not reverse its prior judgment, nor, it seems to us, did not profess to give to the carriers any rights with respect to past shipments that did not exist at the time they were made. These rights were governed by the former decree" (Transcript, p. 29).

The date of the first decision of this Court granting the injunction is March 14th, 1910. Plaintiff does not here attempt to recover for under-charges for the period between that date and June 30th, 1910, nor does it assert that the statute was unconstitutional during that time. Neither does it claim it was coerced. But, it asserts, on June 30th, 1910, and at all times thereafter, the rates became and were confiscatory; and that thereupon it hauled the coal under duress or coercion. Plaintiff's claim amounts to this: The decree was valid when rendered. Unknown to the defendant, plaintiff fixed a test period beginning on June 30th, 1910; it experimented for a year. Then, on July 1, 1911, applied for leave to reopen the case. Now plaintiff says, the first decree of this Court became coercive on June 30th, 1910, upon a date arbitrarily fixed by itself and without notice to defendant.

This procedure was of plaintiff's own selection. In its application for a reopening of the case, after adequate trial of the rates, it neither claimed nor asked leave to collect, pending the final decision, a higher rate than the statutory rate which it had published and was collecting. No motion was made to modify the first decree or injunction; no stay of its operation was asked or obtained. We must, therefore, conclude that plaintiff voluntarily carried the coal for the statutory rates at all times in suit herein; and that no contract can be implied which will impose on defendant any obligation to pay more.

The last judicial action with respect to the statutory rates was the final decree of this Court, which became effective, on mandate, June 5th, 1915. No judicial interference having been had between March, 1910, and June, 1915, the statute was, during all of such period, *prima facie* valid and the rates therein provided were the lawful rates.

The first decree of this Court was not erroneous, and has never been reversed or modified. It was based upon the case presented. The rule contended for by plaintiff, requiring one who has derived a benefit from an erroneous judgment, to make restitution, does not apply to the situation here. The cases cited on pages 15, 16 and 17 of the brief of plaintiff in error can have no application. As we have already shown, defendant derived no unlawful benefit from the first decree in the state case. The state Supreme Court, we believe, correctly viewed the situation when it said:

> "Manifestly, if shippers cannot rely upon the rates as so published and filed, the requirement of publication becomes a mere trap for the unwary. As our judgment, it is wholly improper, in the absence of clear allegations of the rendition of services under a distinct protest, for a court to find that a shipper had, in effect, undertaken, conditionally to pay, according to a rate different from that published in compliance with the statute. The foregoing considerations lead inevitably to the conclusion that there was no contract in fact, either express or implied, to pay any rate other than the statutory rate, and that which, from the entry of the decree forward, must be presumed to have been filed and published in accordance with the provisions of Sections 4727, C. L. 1913, Revised Code of 1905, Section 4342. This should dispose of the complaint, insofar as it may be thought to state a cause of action upon a contract either express or implied in fact.
>
> "But it is urged that the obligation to pay a reasonable rate arose as a matter of law, regardless of any express contract or any contract which might have been implied in fact. But this contention is without merit, for the

reason that the elements essential to the implication of a contract in law are likewise lacking. Where there is no contract in fact, either implied or express, the law will not imply one except to support a recovery in favor of a plaintiff on the principle that the defendant has been unjustly enriched at his expense. While authorities in point are singularly lacking, the controlling principle is clearly the same as in case of mistake, and it is elementary that where the defendant is free from responsibility for plaintiff's mistake, or is responsible in no greater degree than the plaintiff, and where his position is such that the enforcement of restitution would subject him to loss, the defendant is entitled to retain whatever benefit he has derived from the mistake. (Woodward on the Law of Quasi Contracts, Section 20.) In such cases it may be unfortunate that the law does not attempt to distribute the loss; but, until some other basis for recovery than that of unjust enrichment is established, the party who has sustained the loss must bear it. To allow the plaintiff to recover in this action is to visit the consequences of the wrong imposed without the fault of either upon one who would be incapable of obtaining reparation from those who are probably the real beneficiaries of the wrong — the consumers of the commodity.

"It frequently happens that the risk of certain contingencies affecting a transaction must, as a matter of law, be held to be borne by one party rather than the other. The law always leaves a loss where it finds it, unless there is something to indicate that there was an intention to the contrary, or unless it distinctly fixes the burden otherwise."

We, therefore, pray that the judgment of the state court be affirmed.

Respectfully submitted,

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B. F. TILLOTSON,
For Defendant in Error.